Supreme Court, U.S.
FILED
081596 JUN 25 2009
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

IN THE INTEREST OF J.C., A CHILD

On Petition For A Writ of Certiorari To The Court of Appeals of Texas Second District

---

PETITION FOR A WRIT OF CERTIORARI

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner Tracy Rhine

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. In a termination proceeding in a state that provides appeals as a matter of right from decisions terminating parental rights, does the State violate the Due Process Clause by denying court-appointed counsel to an indigent *pro se* parent facing termination of her parental rights without engaging in the due process analysis mandated by this Court in *Lassiter v. Department of Social Services*, then denying the indigent parent a free trial transcript in violation of this Court's decision in *M.L.B. v. S.L.J.*, then denying appellate review of the legal sufficiency of the evidence supporting termination because there is no transcript, and then denying appellate review of all the constitutional issues because the *pro se* indigent parent did not know how to preserve them because she had no attorney?

2. Does a statute providing court-appointed counsel to indigent parents facing termination of their parental rights in State-initiated—but not privately-initiated—actions violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Because this case involves a child, the Fort Worth Court of Appeals used initials and pseudonyms to identify the parties. But the parties' full names are in the trial court pleadings and briefs filed in the Texas Supreme Court. Ms. Rhine therefore refers to the parties, other than J.C., by their real names.

Petitioner is Tracy Rhine, J.C.'s natural mother. Respondents are Carl and Yolanda Deaton, J.C.'s adoptive parents.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions and Orders Below 1

Jurisdiction 1

Constitutional Provision and Statute Involved 1

Statement of the Case 2

Reasons for Granting the Writ 7

I. This Case Raises an Important Issue of Federal Constitutional Law, and the Texas Decisions Conflict with the Reasoning Underlying this Court's Decisions in *Lassiter* and *M.L.B.* 10

A. Ms. Rhine's Parental Rights Are Fundamental. 10

B. Termination of Parental Rights Implicates State Action 11

C. By Removing Too Many Safeguards Against Erroneous Deprivation, Texas Denied Ms. Rhine Due Process 12

II. The Texas Courts' Decision to Let Stand A Statutory Scheme Granting Court-Appointed Counsel to Indigent Parents Defending State-Initiated—But Not Privately-Initiated—Termination Actions Violates the Equal Protection Clause and Conflicts with the Holdings of Four Other State Supreme Courts 19

Conclusion 24

Appendix

Appendix A—*In re J.C.*, Denial of Motion for Rehearing (Tex., Apr. 3, 2009) 1a

Appendix B—*In re J.C.*, Denial of Petition for Review (Tex., Feb. 13, 2009) 2a

Appendix C—*In re J.C.*, 250 S.W.3d 486 (Tex. App. – Fort Worth 2008, pet. denied) 3a

Appendix D—*In re J.C.*, Order of Termination (342nd Dist. Court, Tarrant County, Texas, Nov. 6, 2006) 10a

TABLE OF AUTHORITIES

Page

CASES

Baxstrom v. *Herold*, 383 U.S. 107 (1966) 19-20

Bearden v. *Georgia*, 461 U.S. 660 (1983) 21

Douglas v. *California*, 372 U.S. 353 (1963) 16

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 21

In re Adoption of K.L.P., 763 N.E.2d 741 (Ill. 2002) 12, 20

In re C.M.C, 273 S.W.3d 862 (Tex. App. – Houston [1st Dist.] 2008, no pet.) 16

In re D.S.P., 210 S.W.3d 776 (Tex. App. – Corpus Christi 2006, no pet.) 16

In re E.S.S., 131 S.W.3d 632 (Tex. App. – Fort Worth 2004, no pet.) 16-17

In re Jay, 197 Cal. Rptr. 672 (Cal. Dist. Ct. App. 1983) 22

In re S.A.J.B., 679 N.W.2d 645 (Iowa 2004) 20, 22, 24

In the Matter of K.L.J., 813 P.2d 276 (Alaska 1991) 23

Kramer v. *Union School Dist.*, 395 U.S. 621 (1969) 20-21

Lassiter v. *Dep't of Social Services*, 452 U.S. 18 (1981) ..... *passim*

Loving v. *Virginia*, 388 U.S. 1 (1967) 20

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 7, 11, 12, 13, 14-15, 18, 19, 21

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 6, 9, 10

Matter of Adoption of K.A.S., 499 N.W.2d 558 (N.D. 1993) 20, 22

Mem'l Hosp. v. *Maricopa County*, 415 U.S. 250 (1974) 21

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 7

Parham v. *J.R.*, 442 U.S. 584 (1979) 8

Quilloin v. *Walcott*, 434 U.S. 246 (1978) 8

Reno v. *Flores*, 507 U.S. 292 (1993) 10

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 13

Rivera v. *Minnich*, 483 U.S. 574 (1987) 11

Ross v. *Moffitt*, 417 U.S. 600 (1974) 12

Santosky v. *Kramer*, 45 U.S. 745 (1982) 8, 11, 17

Stanley v. *Illinois*, 405 U.S. 645 (1972) 8, 21

Troxel v. *Granville*, 530 U.S. 57 (2000) 8, 10-11

Vidaurri v. *Ensey*, 58 S.W.3d 142 (Tex. App. – Amarillo 2001, no pet.) 16-17

Washington v. *Glucksberg*, 521 U.S. 702 (1997)..... 10

Welsh v. *United States*, 398 U.S. 333 (1970) 23

Wisconsin v. *Yoder*, 406 U.S. 205 (1972)..... 8

Yonko v. *Dept' of Family & Prot. Servs.*, 196 S.W.3d 236 (Tex. App. – Houston [1st Dist.] 2006, no pet.)..... 16

Zockert v. *Fanning*, 800 P.2d 773 (Or. 1990) 20

CONSTITUTIONS & STATUTES

U.S. CONST. amend. XIV 1-2

TEX. FAM. CODE ANN. § 102.003(a)(12) (Vernon 2002 & Supp. 2008) 3

TEX. FAM. CODE ANN. § 107.013 (Vernon 2002 & Supp. 2008) 2, 3

TEX. FAM. CODE ANN. § 107.021 (Vernon 2002 & Supp. 2008) 3

TEX. FAM. CODE ANN. § 161.003 (Vernon 2002 & Supp. 2008) 3

MISCELLANEOUS

Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. UNIV. OF CHICAGO L.J. 363 (2005) 19

Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Causes: The Challenge for Appellate Courts,* 6 J. OF APP. LAW & PRAC. 186 (2004) 9

TEXAS DEPT. OF FAM. & PROT. SERVCS., 2008 DATA BOOK (2008) 18

William Wesley Patton, *Standard of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases,* 27 LOY. U. CHI. L.J. 195 (1996) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tracy Rhine respectfully submits this petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second District of Texas.

OPINIONS AND ORDERS BELOW

The Texas Supreme Court's orders refusing discretionary review (App., *infra*, at 1a, 2a) are unreported. The opinion of the Court of Appeals for the Second District of Texas (App., *infra*, at 3a) is reported at 250 S.W.3d 486. The judgment entered by the Tarrant County District Court (App., *infra*, at 10a) is unreported.

JURISDICTION

The Court of Appeals for the Second District of Texas filed its opinion on March 13, 2008. The Texas Supreme Court denied a timely petition for discretionary review on February 13, 2009, and denied a timely petition for rehearing on April 3, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Because this petition challenges the constitutionality of a Texas statute affecting the public interest, the terms of 28 U.S.C. § 2403(b) may apply and this petition therefore is being served on the Attorney General of Texas as required by Rule 29.4(c) of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 107.013 of the Texas Family Code provides in pertinent part:

> In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent of the child who responds in opposition to the termination . . . .

STATEMENT OF THE CASE

This case presents issues bedeviling indigent parents in Texas and other states facing termination of their parental rights in the wake of this Court's decision in *Lassiter* v. *Dep't of Social Services*, 452 U.S. 18 (1981), holding that due process does not necessarily require court-appointed counsel for indigent parents in termination actions. In response to *Lassiter*, most states enacted statutes providing court-appointed counsel to indigent parents resisting termination actions. But Texas guarantees counsel

only in State-initiated termination actions—not in actions filed by private parties, even where those private parties obtained standing as guardians or custodians through State action.

1. Statutory Background. In Texas, the State and certain private parties may file actions seeking termination of parental rights. TEX. FAM. CODE ANN. §§ 102.003(a)(12), 161.003 (Vernon 2002 & Supp. 2008). After *Lassiter*, Texas guaranteed court-appointed counsel by statute to all indigent parents facing termination actions. But in 2003, the Texas Legislature amended the statute to guarantee counsel only in State-initiated termination actions; in privately-initiated actions, appointment of counsel is discretionary. *Ibid* §§ 107.013, 107.021.

2. Factual Background and Trial Court Proceedings.[1] J.C. was born on August 10, 2004. The Texas Department of Protective and Regulatory Services removed J.C. from the custody of her mother, Tracy Rhine, at birth following a positive drug test and filed a termination action against Ms. Rhine in Dallas County. The Department then placed J.C. with foster parents Carl and Yolanda Deaton.

The Department and Ms. Rhine settled the termination action by a "binding and irrevocable" settlement agreement permitting Ms. Rhine to regain custody of J.C. upon fulfilling certain conditions. The Department and Ms. Rhine presented their agreement to the Dallas court for approval and enforcement. The Deatons intervened,

---

[1] There is no trial record in this case. The only transcript is from an indigency hearing. Record citations are to that hearing, and the clerk's record from the trial court.

but the court struck that intervention because the Deatons filed it after the enforcement hearing.

After the enforcement hearing but before any ruling, in what the Deatons concede was "a coordinated maneuver," the Department (apparently having thought better of the settlement agreement) non-suited its case (CR 13) and the Deatons filed their own termination action in Tarrant County seeking to adopt J.C. and terminate the parental rights of her parents (CR 1-22). Ms. Rhine answered that lawsuit *pro se* and filed a counter-petition (CR 23-27). She sent the court a letter expressing her love for J.C. and asking the court to "please appoint [her] an attorney ad litem" because she was "indigent and [could not] afford counsel," explaining that her lack of legal knowledge prevented her from effectively presenting her case (CR 40-41).

The Tarrant court refused to appoint counsel for Ms. Rhine and terminated her parental rights following trial. Ms. Rhine filed a motion for new trial, again asking for court-appointed counsel on the basis that: "I was and still remain indigent and can not afford legal counsel, TERMINATION OF PARENTAL RIGHTS, is a matter of dire consequences, and I was not allowed opportunity to Effective legal counsel" (CR 60). When the trial court denied that motion, Ms. Rhine filed an affidavit—which the Deatons contested—of her inability to pay appeal costs. The trial court waived Ms. Rhine's costs of appeal but ordered her to pay for the trial transcript (CR 62, 64).

3. *Court of Appeals Proceedings.* Ms. Rhine appealed to the Fort Worth Court of Appeals, arguing the termination judgment was erroneous and reiterating her complaint about lacking counsel.

But Ms. Rhine's *pro se* appellate brief was mostly incomprehensible. For example, Ms. Rhine's statement of her second issue on appeal reads as follows:

> Kay Riffin, the head of the Family Court Services, gave conflicting testimonies which did not correspond with the written court documents, also during visits the only time there was conflicting documentation was when, Ms. Riffin; herself, or another Single worker whose name I am not clear of being how she did not coherently write her name on any of the documents was over the visits. Which leaves to me to believe that Kay Riffin and her cohort was in fact being massaged by the appellees attorney as well as the Guardian Ad Litem.

(Appellant's Brief). Ms. Rhine complained that she was "never granted a hearing nor did the court ever take into consideration [her] pleas for appointment of counsel." Ms. Rhine concluded by telling the court that although she did "not have counsel [or] hold a law degree, what [she did] have is a child that she loves with her entire being . . . ." *Ibid.*

Though Ms. Rhine complained of her lack of counsel, she did not raise due process or equal protection arguments. Neither did she complain of the trial court's order requiring her to pay for the transcript, though she never obtained it. When Ms. Rhine requested appointment of appellate counsel, the court of appeals remanded the case to the trial

court for an indigency hearing. The trial court found Ms. Rhine indigent but held she was not entitled to court-appointed counsel because the suit was not filed by a governmental entity. The trial court based its decision solely on Texas statutes and did not analyze the factors governing entitlement to court-appointed counsel set out by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

The trial court entered an order waiving costs of appeal but ordering Ms. Rhine to pay for the trial transcript. That order was based not on concern for Ms. Rhine's parental rights or J.C.'s best interests, but for the court reporter's income:

> I'll waive all the cost because of your indigency, with the exception of the four hundred and five dollars which would be necessary to pay for the court record and basically to pay for the typing cost so that the court reporter is not out that money. I don't think it's fair for the court reporter to be out four hundred and five dollars for this appeal.

(Transcript at 13).

The court of appeals affirmed the trial court's termination judgment, rejecting Ms. Rhine's sufficiency challenges because she failed to obtain and file the transcript, and relying on Texas statutes in rejecting her complaint about lack of court-appointed counsel. The court of appeals declined to review the trial court's refusal to provide Ms. Rhine a free transcript because she did not raise that issue, explaining this refusal in a footnote that acknowledged but ignored the due process violation:

> Tracy has not complained of that [transcript] order in this court. *Accord M.L.B.* v. *S.L.J.*, 519 U.S. 102, 128, 117 S. Ct. 555, 570 (1996) (holding that Mississippi had to provide indigent mother in private termination suit with record to afford appellate review of sufficiency of evidence).

4. ***Texas Supreme Court Proceedings.*** Ms. Rhine filed a *pro se* petition for discretionary review in the Texas Supreme Court. Without granting that petition, the Texas Supreme Court ordered merits briefing and asked the State Bar of Texas Appellate Law Section to locate an attorney to represent Ms. Rhine *pro bono.*

Finally represented by counsel, Ms. Rhine raised the equal protection and due process arguments addressed in this petition. In response, the Deatons argued that Ms. Rhine failed to preserve error on her constitutional complaints or provide the appellate court with a complete record. The Texas Supreme Court denied discretionary review without explanation (App., *infra*, at 1a, 2a).

REASONS FOR GRANTING THE WRIT

This case presents two important questions of Federal constitutional law concerning the State's handling of parental-rights termination cases. Nearly a century ago, this Court held that the Due Process Clause protects the right of parents to "establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Since then, this Court consistently has recognized the primacy of the parent-child relationship—and cast a skeptical eye

on government attempts to burden it. See, e.g., *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978); *Parham* v. *J. R.*, 442 U.S. 584, 602 (1979). Even in cases yielding divided opinions, this Court's justices find common ground in their agreement that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky* v. *Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting). And justices who do not view parental rights as constitutionally protected nevertheless concede their place among the "unalienable Rights" the Declaration of Independence posits are bestowed on all Americans by "their Creator." See *Troxel* v. *Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

The first question this case presents is whether the State's cumulative denial of multiple procedural safeguards in a parental-rights termination action—including counsel or any determination of the need for court-appointed counsel under the *Eldridge* factors and the lack of a free trial transcript—elevates the risk of erroneous deprivation too high for the Due Process Clause to bear. This raises the subsidiary issue of what role preservation-of-error rules may play—consistent with the Due Process Clause—in denying appellate review both of the sufficiency of the evidence underlying a termination judgment and the constitutionality of procedures leading up to it. In the end, the result in this case cannot be squared with the due process analysis underlying this Court's decisions in *Lassiter* and *M.L.B.*

The second question is whether the Texas statute extending a substantial procedural safeguard (the right to counsel in termination actions) but then arbitrarily withholding it from some indigent parents violates the Equal Protection Clause. The Texas decisions upholding this scheme conflict with decisions of four other state supreme courts holding that this type of statutory distinction violates the constitutional principle of equal protection.

This case also provides an opportunity for this Court to address what is apparently the continuing refusal by state trial courts to follow this Court's directive in *Lassiter* concerning evaluation of the need for court-appointed counsel under the *Eldridge* factors. Ms. Rhine is indigent, and her parental rights were terminated without the benefit of the *Eldridge* analysis. "Although *Lassiter* requires trial courts in states that do not appoint counsel in every case to perform a *Mathews v. Eldridge* analysis, at least one commentator suggests that these *Lassiter* hearings seldom take place." Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Causes: The Challenge for Appellate Courts,* 6 J. OF APP. LAW & PRAC. 186, 193 (2004) (citing William Wesley Patton, *Standard of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases,* 27 LOY. U. CHI. L.J. 195, 202 (1996).

I. THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW, AND THE TEXAS DECISIONS CONFLICT WITH THE REASONING UNDERLYING THIS COURT'S DECISIONS IN *LASSITER* AND *M.L.B.*

Analysis of the right to counsel in a termination action begins with this Court's decision in *Lassiter* that the Due Process Clause does not require appointment of counsel for indigent parents in every parental-rights termination action. After *Lassiter*, trial courts must conduct a case-by-case analysis—subject to appellate review—of whether federal due process requires appointment of counsel under the existing circumstances. *Ibid* at 31-32. Trial courts must perform this analysis using the factors, set out in *Mathews*, 424 U.S. at 335, that must be weighed against the presumption that there is no right to appointed counsel when there is no risk of lost liberty: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27. But Ms. Rhine lost her child without the benefit of this analysis.

A. Ms. Rhine's Parental Rights Are Fundamental.

The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997); see also *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993). The liberty interest at issue—the interest of parents in the care, custody, and control of their children—"is perhaps the oldest of the fundamental liberty

interests recognized by this Court." *Troxel*, 530 U.S. at 65.

B. Termination Of Parental Rights Implicates State Action.

The Deatons sought to terminate Ms. Rhine's parental rights so they could adopt J.C. State involvement in the adoption process—including the necessary step of termination—is unavoidable. Though termination may be "initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: [The responding parent] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 n.8 (1996).

Termination orders implicate State action; "[f]ew forms of state action are both so severe and so irreversible." *Santosky*, 455 U.S. at 759. A termination decree represents "the State's destruction of . . . family bonds" as the targeted parent "seeks to be spared from the State's devastatingly adverse action." *M.L.B.*, 519 U.S. at 125. Termination invokes "the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'" *Ibid* at 128 (*citing Rivera* v. *Minnich*, 483 U.S. 574, 580 (1987)).

The State removed J.C. from Ms. Rhine's custody and placed her with the Deatons, who obtained standing solely by this State action. The State filed the initial petition seeking termination. The Deatons' termination petition carried out the State's plan—its "coordinated maneuver"—to substitute a private petition for the State petition.

This "maneuver" underscores the potential for chicanery by the State:

> Under those circumstances, the specter could be raised that the state intentionally chose to forego prosecution of a termination of parental rights petition, knowing that the accomplishment of its goal could be reached with greater ease and less expense without its involvement in a proceeding to terminate parental rights if the respondent could be denied the benefit of court-appointed counsel.

In re Adoption of K.L.P., 763 N.E.2d 741, 751 (Ill. 2002) (citation omitted).

The result in this case—if permitted to stand—sanctions conspiracies between the State and private litigants to conspire through a wink-and-a-nod to deprive counsel to indigent Texas parents, clearing the way for termination of their parental rights.

C. By Removing Too Many Safeguards Against Erroneous Deprivation, Texas Denied Ms. Rhine Due Process.

Due process ensures the "essential fairness of state-ordered proceedings anterior to adverse state action." *M.L.B.*, 519 U.S. at 120 (citing *Ross* v. *Moffitt*, 417 U.S. 600, 609 (1974)). Under *Lassiter*, examination of due process in the termination arena turns principally on analysis of the risk that the utilized procedures will result in erroneous decisions. *Lassiter*, 452 U.S. at 27.

Ms. Rhine was adjudged indigent but did not receive

- a trial lawyer,
- an appellate lawyer,
- the benefit of analysis of the *Eldridge* factors,
- a free transcript for appeal,
- appellate review of the denial of counsel under due process analysis,
- appellate review of the denial of a transcript, or
- appellate review of the sufficiency of the evidence supporting termination of her parental rights.

Perhaps none of these deficiencies taken alone—other than denial of the transcript, which denied Ms. Rhine due process under *M.L.B.* had she known how to preserve that violation—meant Ms. Rhine did not receive due process.[2] After all, *Lassiter* establishes that lack of counsel is not necessarily a due process violation. And this Court "has never held that the States are required to establish avenues of appellate review . . . ." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966). But the cumulative effect of these denials raised the risk of erroneous

---

[2] Of course, *Lassiter* acknowledged that appointment of counsel is required when warranted by the character and difficulty of the case. *Lassiter*, 452 U.S. at 31-32. There is no record the trial court ever performed any analysis of the *Eldridge* factors to determine whether Ms. Rhine's defense warranted appointment of counsel. And the trial court's failure to do so during the indigency hearing suggests no such analysis ever occurred. It is unclear whether *Lassiter* mandated appellate review of the *Eldridge* analysis as a due process requirement.

deprivation beyond the constitutional breaking point.

The decisions by the Fort Worth Court of Appeals and the Texas Supreme Court upholding the termination decree conflict with the rationales of *M.L.B.* and *Lassiter*. Texas denied Ms. Rhine appellate review because she could not afford a transcript and did not know how to assert denial of that transcript as a due process violation. This cannot be acceptable where State action may "permanently deprive [Ms. Rhine] of her freedom to associate with her child . . . ." *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting).

This is not a situation where the appellate court had to rely on a litigant to alert it to a constitutional issue. The court of appeals judges knew there was no transcript. They knew the trial court denied Ms. Rhine's request for a free transcript. They knew about this Court's decisions in *M.L.B.* and *Lassiter*, and knew from the indigency hearing transcript filed in their court that the trial court failed to apply the *Eldridge* factors. They are trained in the law and rose in their professions to become appellate court judges. They did not need an indigent parent whose last job was as an hourly-wage fast-food worker to tell them the trial court had (twice) violated the Constitution.

In his dissenting opinion in *M.L.B.*, Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) examined the safeguards usually present in a termination action: an impartial tribunal applying procedural and evidentiary rules, the right to confront opposing evidence and witnesses, application of the clear-and-convincing evidence standard, representation by counsel or

alternatively the trial court's determination no counsel is required under the circumstances, and appellate review of the denial of counsel and the merits of termination. See *M.L.B.*, 519 U.S. at 132 (Thomas, J., dissenting).

Ms. Rhine lacked too many of these safeguards. She lacked counsel, essentially rendering the procedural and evidentiary protections useless. Even a cursory review of Ms. Rhine's briefs reveals that she could not have presented her case effectively or made coherent evidentiary arguments. Ms. Rhine failed to present to the appellate court her entitlement under *M.L.B.* to a free transcript, and failed to raise colorable due process and equal protection arguments. The idea that she effectively confronted the evidence and witnesses against her without counsel is dubious at best. In *M.L.B.*, Justice Thomas cited the presence of counsel as an integral component in ensuring due process: "She was represented by counsel . . . [and] [t]hrough her attorney . . . was able to confront the evidence and witnesses against her." *Ibid.* Not so Ms. Rhine.

Ms. Rhine also lacked the important protection of the *Eldridge* analysis mandated by this Court in *Lassiter*. That analysis ensures appointment of counsel in cases that warrant it. And the requirement itself constitutes this Court's acknowledgement that some termination cases require appointment of counsel. The trial court denied Ms. Rhine counsel based solely on the Texas statute, but that statute does not trump federal due process requirements.

All this, of course, normally would be subject to appellate review. But the Texas courts denied Ms. Rhine review of her due process and equal protection

claims because she did not know how to preserve them. The Fort Worth Court of Appeals did not address the trial court's decision denying Ms. Rhine a free trial transcript because she did not know to raise that error. The court then refused to consider Ms. Rhine's substantive complaints about the termination order because she failed to provide the transcript. And the Texas Supreme Court refused to review any of these issues.

Texas left Ms. Rhine in the jarring position of being denied a lawyer, then being denied appellate review because she did not know how to preserve error (presumably because nothing in her Whataburger training acquainted her with error-preservation rules). *Lassiter* relied on the corrective measure of appellate review as a crucial bulwark against trial court error, expressly instructing that the trial court's due process analysis be subject to appellate review. *Lassiter*, 452 U.S. at 32. Without counsel or a transcript, and held strictly to error-preservation requirements, Ms. Rhine was left with "a meaningless ritual, while the rich man [would have had] a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

Appeals of Texas termination orders are an essential component of due process, because Texas trial courts sometimes misapply the clear-and-convincing evidence standard and erroneously terminate parental rights, leaving appeal as the sole remedy for these erroneous deprivations. See, e.g., *In re C.M.C.*, 273 S.W.3d 862 (Tex. App. – Houston, no pet.); *Yonko* v. *Dep't of Family & Prot. Servs.*, 196 S.W.3d 236 (Tex. App. – Houston [1st Dist.] 2006, no pet.); *In re D.S.P.*, 210 S.W.3d 776 (Tex. App. – Corpus Christi 2006, no pet.); *In re E.S.S.*, 131

S.W.3d 632 (Tex. App. – Fort Worth 2004, no pet.); *Vidaurri* v. *Ensey*, 58 S.W.3d 142 (Tex. App. – Amarillo 2001, no pet.).

Finally, the issue of error preservation—the threshold to appellate review—also is reviewed under the *Eldridge* factors. Weighing these factors, Ms. Rhine's fundamental liberty interest in maintaining custody and control of J.C., the risk of permanent loss of their parent-child relationship, and everyone's interest in a just and accurate decision weigh heavily in favor of permitting appellate review of the sufficiency of the evidence despite Ms. Rhine's failure to preserve error. And the State's fundamental interest in protecting J.C.'s best interests is not antagonistic to those concerns.

The State's corollary interest in efficient and speedy resolution pales in comparison to the private interests at stake. The State's interest in protecting child welfare must begin by working toward *preserving* the familial bond, rather than severing it. See *Santosky*, 455 U.S. at 766-67. The fundamental liberty interests at issue are too dear, and the risk of erroneous deprivation too substantial, for this Court to countenance waiver of Ms. Rhine's appellate rights through error-preservation requirements in light of her lack of counsel or a trial record.

At a minimum, *Lassiter* required the appellate court to use the *Eldridge* factors to analyze whether application of preservation-of-error rules violated due process. In *Lassiter*, this Court held that the interest affected by the potential termination of parental rights is sufficiently important that state courts must, under the Due Process Clause, either provide counsel or make a case-by-case determination of whether appointment

of counsel is necessary. It follows, then, that due process would require a state court to make a similar case-by-case determination of whether error-preservation rules must be relaxed to comport with due process in a particular case, rather than applied rigidly in lock-step with other civil cases.

This Court recognized in *Lassiter* that because termination proceedings affect one of the most fundamental rights in American society, due process requires intense and searching scrutiny by trial courts—subject to appellate review—to ensure procedures sufficient to guard against an unacceptable risk of erroneous deprivation. In *M.L.B.*, this Court applied that scrutiny to strike down a state law conditioning termination appeals on the ability to pay for a transcript. And while the majority and dissenting justices of this Court disagreed in *M.L.B.* about the parameters of the due process requirement, they were unanimous in reiterating their commitment to a searching examination of the given circumstances in termination cases to ensure fundamental fairness.

This issue has the potential to affect scores of indigent parents in Texas and other states. Almost 4 million Texans live in poverty, and many of them have children. As of August 31, 2008, approximately 14,000 Texas children were placed in foster homes. TEXAS DEPT. OF FAM. & PROT. SERVCS., 2008 DATA BOOK 49 (2008). And even though the total number of children being placed in foster homes is declining in Texas, the number placed as a result of parental-rights termination is rising—with more than 10,000 Texas children in foster case after having both their parents' parental-rights terminated. *Ibid* at 52-53.

Of course, the lack of *Lassiter* analysis has the potential to affect (and probably is affecting) indigent parents in many other states. At least ten states other than Texas fail to provide a statutory right to counsel for indigent parents facing termination proceedings. See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. UNIV. OF CHICAGO L.J. 363, 367 (2005). And rigid application of error-preservation rules without any balancing test is a national issue that could affect even indigent parents in those states that provide court-appointed counsel.

Ms. Rhine did not have a lawyer, could not afford a transcript, and was denied appellate review because she did not know how to raise and preserve error. This result cannot be squared with the type of due process scrutiny suggested by *Lassiter* and both the majority and dissenting opinions in *M.L.B.*

II. THE TEXAS COURTS' DECISION TO LET STAND A STAUTORY SCHEME GRANTING COURT-APPOINTED COUNSEL TO INDIGENT PARENTS DEFENDING STATE-INITIATED—BUT NOT PRIVATELY INITIATED—TERMINATION ACTIONS VIOLATES THE EQUAL PROTECTION CLAUSE AND CONFLICTS WITH THE HOLDINGS OF FOUR OTHER STATE SUPREME COURTS.

The Equal Protection Clause forbids Texas from making a substantial procedural safeguard generally available but arbitrarily withholding it from some litigants. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), this Court found that a legislative

scheme guaranteeing a jury trial to mental patients facing commitment proceedings under one statute but not another violated the Equal Protection Clause. *Ibid* at 110. A state, having made a substantial procedural safeguard "generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Ibid* at 111.

Texas extends a substantial procedural safeguard—the right to counsel in termination actions—but arbitrarily withholds it from indigent parents like Ms. Rhine. While the Texas courts permitted this scheme to stand, four other state supreme courts have concluded that it violates their respective state equal protection guarantees. *In re Adoption of K.L.P.*, 763 N.E.2d 741 (Ill. 2002); *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993); *Zockert* v. *Fanning*, 800 P.2d 773 (Or. 1990). As the Oregon Supreme Court put it: "The legislative grant of the opportunity for a parent to benefit from the privilege of assistance of counsel in one mode of termination of parental rights requires that the opportunity to exercise that privilege be extended to all similarly situated parents directly threatened with permanent loss of parental rights." *Zockert*, 800 P.2d at 778.

Because the Texas statute burdens Ms. Rhine's attempt to exercise a fundamental right, this Court reviews the statute with heightened scrutiny. Traditionally, this analysis was referred to as "strict scrutiny" necessitating a "compelling state interest." See, e.g., *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Kramer* v. *Union School Dist.*, 395 U.S. 621, 626-29

(1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972). Recently, however, this Court has applied a more fluid standard of review, inspecting "the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." *M.L.B.*, 519 U.S. at 120-21 (citing *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983)).

Regardless of the precise standard of review employed, the Texas intrusion on Ms. Rhine's fundamental rights cannot survive any heightened level of equal protection scrutiny. Ms. Rhine's right to J.C.'s care, custody, and companionship is a central right that "warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 U.S. at 651. This is especially true in the termination context, because termination "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27. Texas would need a mighty justification for burdening such a towering individual right.

The most likely justification for the Texas scheme is the State's interest in conserving fiscal resources. But this Court has cautioned that while a state's pecuniary interest is legitimate, it is "hardly significant enough to overcome private interests as important as those" involved in parental rights determinations. *Ibid* at 28. Governmental pecuniary concerns are "unimpressive" when measured against the stakes for parents facing termination proceedings. See *M.L.B.*, 519 U.S. at 121; see also *Mem'l Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974) (conservation of public funds insufficient to state interest to justify infringement on right to migrate freely among states).

"Nor is such legislative framework narrowly tailored to further a pecuniary interest; the State could develop measures to recoup these costs, if it desired to do so." *S.A.J.B.*, 679 N.W.2d at 650 (citing *K.A.S.*, 499 N.W.2d at 565). And, as this Court previously has cautioned, to "water down" strict scrutiny in one context would be to "subvert its rigor" elsewhere. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990).

Alternatively, the Texas Legislature may have decided that only indigents who "must overcome the vast resources of the state" deserve counsel appointed at public expense. *K.A.S.*, 499 N.W.2d at 565. But this "understates the actual involvement of the state . . . which is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child . . . ." *K.A.S.*, 499 N.W.2d at 565-566 (quoting *In re Jay*, 197 Cal. Rptr. 672, 680 (Cal. Dist. Ct. App. 1983)). Ms. Rhine was resisting imposition of the State's official decree extinguishing her parental rights. In practical effect, no difference exists between State-initiated and privately-initiated termination actions. And certainly no difference that would be dispositive of the equal protection issue.

Of course, the government always has a compelling interest in resolving child custody matters economically and efficiently, and obtaining a permanent home for a child as quickly as possible. But these efficiency interests pale in comparison to the risk that a parent may erroneously be deprived of parental rights and a child may erroneously be deprived of a parent's support and companionship. And efficiency concerns are only marginally implicated—if they are implicated at all —by the

right to counsel. The presence of counsel on both sides of a dispute usually promotes efficient settlement and reduces wasted time. When both parties have attorneys, fewer fruitless arguments are raised, less irrelevant evidence is offered, and there are fewer delays. And providing counsel promotes the best interests of children:

> If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

In the Matter of K.L.J., 813 P.2d 276, 280 (Alaska 1991).

Where a statute is defective because of underinclusion, there are two remedial alternatives: a court may (1) declare the statute a nullity and order that its benefits not extend to the class the legislature intended to benefit, or (2) extend the statute's coverage to those aggrieved by exclusion. *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). The latter approach is warranted in this case. To deny all counsel would violate this Court's directive in *Lassiter* that some cases require appointment of counsel to comport with due process. See *Lassiter*, 452 U.S. at 31-32. The proper remedy for the constitutional imbalance is extension of the privilege to the neglected portion

of the class—in this case, essentially restoring the Texas statute to its original scope.

Ms. Rhine was entitled to court-appointed counsel. "[T]here is no narrowly tailored compelling state interest to deny counsel at public expense to indigent parents facing an involuntary termination of their parental rights" in a privately-initiated proceeding. *S.A.J.B.*, 679 N.W.2d at 650. The Texas statutory framework, which denies court-appointed counsel to some indigent parents while granting it to others, violates the Equal Protection Clause.

CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner Tracy Rhine

APPENDIX A

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS AUSTIN, TEXAS

Case No. 08-0351
COA #: 02-07-00081-CV
TC#: 324-397088-06

STYLE: IN THE INTEREST OF J.C., A CHILD

DATE: April 3, 2009

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

APPENDIX B

OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS AUSTIN, TEXAS

Case No. 08-0351
COA #: 02-07-00081-CV
TC#: 324-397088-06

STYLE: IN THE INTEREST OF J.C., A CHILD

DATE: February 13, 2009

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX C

FILED
COURT OF APPEALS
SECOND DISTRICT OF TEXAS
MAR. 13, 2008
STEPHANIE ROBINSON, CLERK

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-081-CV

In the Interest of J.C., A Child

FROM THE 324TH DISTRICT COURT OF
TARRANT COUNTY

OPINION

I. INTRODUCTION

In this termination of parental rights appeal, we confront the statutory right-to-counsel disparity that exists between indigent parents in a private termination suit and indigent parents in a termination suit brought by Child Protective Services (CPS). Indigent parents in a private termination of parental rights suit possess no statutory right to appointed counsel while indigent parents in a CPS-initiated suit do. *See* TEX. FAM

COD ANN. § 107.013(a)(1) (Vernon Supp. 2007) (mandating appointment of attorney ad litem for an indigent parent "in suit filed by governmental entity in which termination of the parent-child relationship is sought"). Here, although CPS initiated the suit to terminate the parental rights of Appellant Tracy, who is J.C.'s mother, in a coordinated maneuver, CPS subsequently nonsuited its termination suit, and on the same day, J.C.'s foster parents filed their own private termination suit. Consequently, because she was now defending a private termination suit, instead of a CPS-prosecuted termination suit, Tracy was forced to proceed pro se in the trial court and likewise proceeds pro se here. Because there is no relief available to Appellant, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Upon her birth in Dallas, Texas, J.C. tested positive for phencyclidine. CPS removed J.C. from Tracy at birth and filed a suit in Dallas County to terminate Tracy's parental rights to J.C. While CPS's termination suit was pending, CPS placed J.C. with foster parents, Appellees Mr. and Mrs. Smith who are Tarrant County residents.[1] The Smiths later attempted to intervene in CPS's termination suit, but their petition was stricken by the trial court. Because the statutory deadline for disposition of the termination suit was approaching[2] and for

---

1 We refer to Appellees by the fictitious names of Mr. and Mrs. Smith. See TEX. FAM. CODE ANN. § 109.002(d) (Vernon 2002).

2 *See* TEX. FAM CODE ANN. § 263.401 (Vernon Supp. 2007) (setting forth deadlines for commencing trial on the merits of a termination suit filed by a governmental entity).

other reasons not relevant to this appeal, CPS nonsuited its termination suit.

On the same day that CPS nonsuited its termination suit, Mr. and Mrs. Smith filed in Tarrant County an "Original Petition for Termination of Parental Rights & Request for Temporary Orders & Request for Temporary Restraining Order." The Smiths sought to be named temporary managing conservators of J.C., to terminate Tracy's and J.C.'s father's parental rights, and to adopt J.C. The trial court entered temporary orders naming the Smiths temporary managing conservators of J.C.

Tracy filed a pro se answer in the Smiths' termination suit. She also sent a letter to the trial court judge stating, "I am indigent and cannot afford counsel." She explained, "I am currently attending community college in hopes to be able to provide my daughter with a better future and security...." She expressed her love for her daughter and her inability to properly represent herself and reiterated her need for an attorney.

In due course, the Smiths' termination suit was called for final trial. Tracy appeared pro se. After the trial, the trial court terminated Tracy's parental right to J.C., finding by clear and convincing evidence that Tracy had

> a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;
>
> b. failed to support the child in accordance with [her] ability during a

> period of one year ending within six months of the date of the filing of the petition;
>
> c. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and
>
> d. been the cause of the child's being born addicted to alcohol or a controlled substance legally obtained by prescription, as defined by section 261.001 of the Texas Family Code.

The trial court also found that termination of Tracy's parental rights was in J.C.'s best interest. J.C.'s father did not appear at trial and is not a party to this appeal.

Tracy subsequently filed a "Mother's Motion for Re-Trial," complaining that, "I was and still remain indigent and cannot afford legal counsel, TERMINATION OF PARENTAL RIGHTS, is a matter of dire consequences, and I was not allowed opportunity of Effective legal counsel." Tracy also filed a notarized "Mother's Affidavit of Inability to Pay Costs of Appeal." The Smiths filed a contest to Tracy's pauper's affidavit. After a hearing, the trial court sustained the contest in part to the extent that Tracy was ordered to pay $405 for the reporter's record.[3] *See* TEX R. APP. P. 20.1(k) (authorizing

---

[3] Tracy has not complained of that order in this court. *Accord M.L.B. v. S.L.J.*, 519 U.S. 102, 128, 117 S. Ct. 555, 570 (1996) (holding that Mississippi had to provide indigent mother in private termination suit with record to afford appellate review of sufficiency of evidence).

order of partial payment of costs). The trial court denied the balance of the contest and ordered that Tracy be permitted to appeal without the payment of any other costs.

Tracy then filed a request with this court for appointment of counsel on appeal. We abated the appeal to the trial court for consideration of her request, and the trial court held that no statutory mandate existed requiring the appointment of counsel in a private termination suit. Tracy did not pay the $405 that she was ordered to pay toward the reporter's record, and no reporter's record has been filed in this appeal. Tracy has filed a pro se brief raising four issues.

III. TRACY'S ISSUES

In her first issue, Tracy attacks the sufficiency of the evidence to support the grounds for termination found by the trial court and to support the trial court's best interest finding. In her second issue, Tracy complains that the trial court should not have believed the testimony of Kay Riffin. In her third issue, Tracy complains that the bonding assessor did not obtain her permission to conduct a bonding assessment. In her fourth issue, Tracy complains that the trial court did not appoint her counsel. We cannot review Tracy's first three issues in the absence of a reporter's record. *See, e.g., Catalina v. Bladel*, 881 S. W.2d 295, 297 (Tex. 1994) (explaining that after a bench trial, a trial court's findings of fact are conclusive unless the appellate court has a complete reporter's record); *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998) (explaining that appellate court may not pass upon a witness's credibility or substitute its

judgment for that of the fact-finder), *cert. denied*, 525 U.S. 1017 (1998).

Concerning Tracy's fourth issue, no statutory right exists to appointed counsel in a private termination suit. The legislature has mandated the appointment of counsel for indigent parents in a termination suit only "in a suit filed by a governmental entity in which termination of the parent-child relationship is sought." *Compare* TEX. FAM. CODE ANN. §§ 107.001(1), 015(a), (b), .021 (Vernon Supp. 2007) (appearing to permit, in a private termination suit, permissive appointment of an attorney ad litem for a parent and payment of such attorney ad litem "by one or more of the parties") with § 107.013(a)(1) (mandating appointment of attorney ad litem for an indigent parent in a termination suit filed by a governmental entity); *see also generally Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 101 S. Ct. 2153 (1981). Here, CPS nonsuited its Dallas County termination suit, and the Smiths concurrently filed a new private termination suit in Tarrant County seeking to terminate Tracy's parental rights to J.C. Because Tracy's parental rights were terminated pursuant to a private termination suit, she possessed no mandatory statutory right to appointed counsel; although we abated this case to the trial court to consider the availability, if any, of discretionary appointment of counsel for Tracy, the trial court declined to appoint counsel. There is no relief that this court may grant to Tracy concerning the appointment of counsel.

IV. CONCLUSION

Having overruled all of Tracy's issues, we affirm the trial court's judgment termination Tracy's parental rights to J.C.

s/Sue Walker
SUE WALKER
JUSTICE

PANEL M: LIVINGSTON, DAUPHINOT, and WALKER, JJ.

DELIVERED: March, 13, 2008

APPENDIX D

NO. 324-397088-06

IN THE INTEREST OF JASALYN CROW,
A CHILD

IN THE 342TH JUDICIAL DISTRICT COURT

TARRANT COUNTY, TEXAS

ORDER OF TERMINATION

1. Date of Hearing

On November 6, 2006, the Court heard this case.

2. Appearances

Petitioners, CARL DEATON AND YOLANDA DEATON, appeared in person and through attorney of record, KELLYE A. SWANDA, and announced ready for trial.

Respondent, DARIA SHERMAN, a/k/a TRACY RHINE, appeared in person *pro se* and announced ready for trial.

Also appearing was KEE ABLES, appointed by the Court as guardian ad litem of the child the subject of this suit.

Also appearing was MAX BREWINGTON, appointed by the Court as attorney ad litem for ANTHONY FARQUASON, who received process by substituted service but did not otherwise answer or appear.

3. Jurisdiction

The Court, after examining the record and hearing the evidence and argument of counsel, finds

that it has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

4. Jury

A jury was waived, and all questions of fact and law were submitted to the Court.

5. Record

The record of testimony was duly reported by the court reporter for the 324th Judicial District Court.

6. Child

The Court finds that the following child is the subject of this suit:

Name:	JASALYN CROW
Sex:	Female
Birth date:	August 10, 2004

7. Termination

Mother.

The Court finds by clear and convincing evidence that DARIA SHERMAN a/k/a TRACY RHINE has –

a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;

b. failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

c. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and

d. been the cause of the child's being born addicted to alcohol or a controlled substance, other

than a controlled substance legally obtained by prescription, as defined by Section 261.001 of the Texas Family Code.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between DARIA SHERMAN a/k/a TRACY RHINE and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship between DARIA SHERMAN a/k/a TRACY RHINE and the child the subject of this suit is terminated.

Alleged Father.

The Court finds by clear and convincing evidence that ANTHONY FARQUASON has –

a. knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child;

b. failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

c. voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth; and

d. failed to register with the paternity registry under Chapter D, Chapter 160, Texas Family Code.

The Court also finds by clear and convincing evidence that termination of the parent-child

relationship, if any exists or could exist, between the alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist between ANTHONY FARQUASON and the child the subject of this suit is terminated.

8. Inheritance Rights

IT IS ORDERED that the right of the child to inherit from and through DARIA SHERMAN a/k/a TRACY RHINE and ANTHONY FARQUASON is termination.

9. Home Screening

The Court finds that the required preadoptive home screening report will be made and filed.

10. Interstate Compact

The Court finds by clear and convincing evidence that Petitioners have filed a verified allegation or statement regarding compliance with the Interstate Compact on the Placement of Children as required by section 162.002 of the Texas Family Code.

11. Managing Conservator

IT IS ORDERED that CARL DEATON and YOLANDA DEATON are appointed Managing Conservators of the child the subject of this suit, the Court finding this appointment to be in the best interest of the child.

12. Attorney's Fees, Expenses, and Costs

The Court finds that KEE ABLES has satisfactorily discharged all of her duties and obligations under chapter 107 of the Texas Family Code, and IT IS ORDERED that she is hereby discharged and relieved of any further rights, duties, and responsibilities in this cause. The Court finds that KEE ABLES has incurred $5,566.25 as

professional fees and expenses, which were a necessary benefit for the child. IT IS FURTHER ORDERED that KEE ABLES is awarded $5,566.25 as professional fees rendered as guardian ad litem. These fees are taxed as costs, and CARL DEATON AND YOLANDA DEATON, Petitioners, are ORDERED to pay the fees to KEE ABLES by cash, cashier's check, or money order on or before December 6, 2006. KEE ABLES may enforce this order for fees in her own name.

IT IS ORDERED that MAX BREWINGTON is awarded $1,200.00 as attorney's fees for legal services rendered for ANTHONY FARQUASON, who received process by substituted service but did not otherwise appear. These fees are taxed as costs, and CARL DEATON, Petitioner, and YOLANDA DEATON, Petitioner, are ORDERED to pay the fees to MAX BREWINGTON by cash, cashier's check, or money order on or before December 6, 2006. MAX BREWINGTON may enforce this order for fees in his own name.

13. Costs

IT IS ORDERED that costs of court are to be borne by the party who incurred them.

14. Relief Not Granted

IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

This Order of Termination judicially PRONOUNCED AND RENDERED in court at Fort Worth, Tarrant County, Texas, on November 6, 2006, and further noted on the court's docket sheet on the same date, but signed on January 4, 2007.

s/JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

s/Kellye A. Swanda
State Bar No. 00792884
109 East Park Row Drive
Arlington, Texas 76010
(817) 465-4664
FAX: (817) 465-3779
Attorney for Petitioners

s/Kee Ables
State Bar No. 24009854
The Morgan House
720 West Abrams Street
Arlington, Texas 76013
(817) 469-9900, Ext. 14
FAX: (817) 274-5175
Attorney Ad Litem for Child

s/Max Brewington
State Bar No. 00796079
9284 Huntington Square, Suite 100
North Richland Hills, Texas 76180
(817) 581-7189
FAX: (817) 788-0302
Attorney for Respondent Cited by Publication
ANTHONY FARQUASON

Tracy Rhine, Respondent *Pro Se*
3915 Romana, Unit A
Dallas, Texas 75216

No. 08-1596

Supreme Court, U.S.
FILED
JUL 22 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TRACY RHINE,

Petitioner,

v.

CARL DEATON, et ux.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEAN M. SWANDA
SWANDA & SWANDA, P.C.
109 E. Park Row Drive
Arlington, Texas 76010
(817) 467-4668

Counsel for Respondents
Carl and Yolanda Deaton

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The Deatons have one correction to make to Ms. Rhine's "Parties to the Proceeding." Ms. Rhine identifies the Deatons as J.C.'s adoptive parents. The Deatons have not adopted J.C. and will not initiate adoption proceedings until these proceedings are over. Technically the Deatons are J.C.'s managing conservator. (CR 56.)

Regarding the identification of the parties by initials or aliases, section 109.002(d) of the Texas Family Code provides: "On motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only." Tex. Fam. Code § 109.002(d). The Fort Worth Court of Appeals used this provision in its opinion. *In re J.C.*, 250 S.W.3d 486, 487 n.1 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending). There was no comparable provision for briefs, motions, and other papers filed with the court. Effective September 1, 2008, rule 9.8 of the Texas Rules of Appellate Procedure requires the parties to use initials or fictitious names for minors in all papers submitted to the court, including all appendix items. The only exception is the docketing statement. Additionally, if the court orders it, the parties are to use initials or fictitious names for a minor's parent or other family members if doing so is necessary to protect a minor's identity. TEX. R.

PARTIES TO THE PROCEEDING – Continued

APP. P. 9.8. The Deatons agree with Ms. Rhine that at this juncture there is no point in not using the parties names – at least in the briefs.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	iii
Table of Authorities	v
Cases	v
Statutes	vi
Rules	vii
References to the Record	1
Summary of the Arguments	2
Reasons for Denying the Writ	4
(1) Ms. Rhine preserved none of her complaints; (2) the results are sufficiently reliable; and (3) Ms. Rhine has not shown counsel would have made a determinative difference	4
(1) Ms. Rhine preserved none of her complaints	4
(2) The results are sufficiently reliable	9
(3) Ms. Rhine has not shown counsel would have made a determinative difference	9
What Happened in Dallas County	10
How the Case Ended Up in Tarrant County	16
Regarding the Appointment of an Attorney for J.C.	19

TABLE OF CONTENTS – Continued

Page

Regarding the Appointment of an Attorney for the Missing Father 21

Regarding the Possible Appointment of Counsel to Ms. Rhine 23

What Happened in Tarrant County 27

Regarding the Possible Appointment of Appellate Counsel 28

Regarding the Reporter's Record 29

Final Comments 31

The Attorney General of the State of Texas 33

Conclusion 34

Appendix

Appendix A – The April 17, 2007, letter from the Fort Worth Court of Appeals to Ms. Rhine regarding the Reporter's Record ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

B.L.D., In re, 113 S.W.3d 340 (Tex. 2003), *cert. denied*, 541 U.S. 945, 124 S. Ct. 1674, 158 L. Ed. 2d 371 (2004) 7, 8, 9

D.D.M., In re, 116 S.W.3d 224 (Tex. App. – Tyler 2003, no pet.) 13

Dreyer v. Greene, 871 S.W.2d 697 (Tex. 1993) 7

Exxon Shipping Co. v. Baker, ___ U.S. ___, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) 6, 9

J.C., In re, 250 S.W.3d 486 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending) ..... i, 5, 27, 29

Lassiter v. Department of Social Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) 8, 9

L.J.S., In re, 96 S.W.3d 692 (Tex. App. – Amarillo 2003, pet. denied) 13

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 8

R.R., In re, 209 S.W.3d 112 (Tex. 2006) 30

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) 7

Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) 6, 9

TABLE OF AUTHORITIES – Continued

Page

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) 7

Yee v. City of Escondido, Cal., 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) 7, 9

STATUTES

TEX. FAM. CODE § 103.001(a) 17

TEX. FAM. CODE § 107.001(2) 21, 23

TEX. FAM. CODE § 107.003 21

TEX. FAM. CODE § 107.004 21

TEX. FAM. CODE § 107.011 19

TEX. FAM. CODE § 107.012 19

TEX. FAM. CODE § 107.013(a)(2) 22

TEX. FAM. CODE § 107.015 ..... 25, 26

TEX. FAM. CODE § 107.015(c) 14, 26

TEX. FAM. CODE § 107.021 20

TEX. FAM. CODE § 107.021(a) 24

TEX. FAM. CODE § 107.021(a-1) 20, 24

TEX. FAM. CODE § 107.021(b) 25

TEX. FAM. CODE § 107.022 ..... 26, 27

TEX. FAM. CODE § 107.023 27

TEX. FAM. CODE § 107.023(c) 27

TEX. FAM. CODE § 109.002(d) i

TEX. FAM. CODE § 161.002(e) 22

TABLE OF AUTHORITIES – Continued

Page

TEX. FAM. CODE § 263.401(a) 10

TEX. FAM. CODE § 263.401(b) 10, 12

TEX. FAM. CODE § 263.401(c) 12, 13, 14

RULES

TEX. R. APP. P. 9.8 ..... i, ii

TEX. R. APP. P. 20.1(k) 5

TEX. R. APP. P. 49 29

TEX. R. APP. P. 320 28

No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,

Petitioner,

v.

CARL DEATON, et ux.,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Texas
Second District

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES, respondents, Carl and Yolanda Deaton, respectfully present this "Brief in Opposition to the Petition for Writ of Certiorari."

REFERENCES TO THE RECORD

The Deatons maintain the nomenclature used for the record in Texas. For court documents, such as petitions, motions, orders, and the judgment, the record is referred to as the "Clerk's Record." There

was a "Clerk's Record," which the Deatons will refer to as "(CR page number)." There was also an "Abatement Hearing Supplemental Clerk's Record," which the Deatons will refer to as "(CR Supp. page number)." The transcription of the testimony at trial and at any hearings is referred to as the "Reporter's Record." There was no transcription of the trial. There is a transcription of an abatement hearing. An appellate court clerk apparently handwrote the word "Supplemental" to the caption of the Reporter's Record ostensibly because the transcription of the abatement hearing was filed after the transcription of the trial testimony normally would have been filed. As it is the only transcription, the Deatons refer to it simply as "(RR page number)."

SUMMARY OF THE ARGUMENTS

Ms. Rhine preserved none of the issues she presents for review. She has not shown she raised them in the trial court (while pro se), she did not raise them in the court of appeals (while pro se), or in her petition for review filed in the Supreme Court of Texas (while pro se). She raised all of her issues for the first time in her "Brief on the Merits" (with the aid of counsel) in the Supreme Court of Texas. As recently as 2003, the Supreme Court of Texas wrote an opinion addressing when appellate courts may address unpreserved claims in termination proceedings. The Supreme Court of Texas is sensitive to this issue. After the Supreme Court of Texas reviewed the

briefs on the merits as well as a reply brief in this case, it declined to review the unpreserved complaints. The Supreme Court of the United States has written that whether a court of appeals chooses to address unpreserved issues is a matter of appellate court discretion. The Supreme Court of the United States has also written that when a party raises a constitutional claim for the first time in a state supreme court, and when the state supreme court denies discretionary review, it will, "with very rare exceptions," refuse to consider the party's claim. The Deatons ask this Court to respect the discretion exercised by the Supreme Court of Texas. Although Ms. Rhine raises troubling concerns about Texas procedures, this is not the proper case to resolve those issues. Resolving them will only destabilize J.C.'s life for years to come, and Ms. Rhine will never be able to persuade a court to return J.C. to her – even with the assistance of counsel. The proper place to resolve these issues is in the Texas legislature. This case provides a concrete example of how the Texas procedures work and what their implications are. This case has drawn the attention of prominent attorneys who can articulate their concerns to the Texas legislature. Destabilizing J.C.'s life for potentially years to come to address these concerns is not justified where Ms. Rhine is fighting a hopeless cause on the termination issue.

The Deatons further contend the results are sufficiently reliable. Ms. Rhine has not shown the presence of counsel could have made a determinative

difference. Ms. Rhine led an unstable and dangerous life, apparently without recognizing her own instability and without recognizing the dangers with which she tempted fate. Ms. Rhine, in turn, has destabilized her daughter's life for nearly five years now. The Deatons are not part of the problem. They are part of the solution. In characteristic self-defeating fashion, Ms. Rhine is attempting to knock out the only source of stability her daughter has ever known.

REASONS FOR DENYING THE WRIT

(1) Ms. Rhine preserved none of her complaints; (2) the results are sufficiently reliable; and (3) Ms. Rhine has not shown counsel would have made a determinative difference.

(1) Ms. Rhine preserved none of her complaints.

Ms. Rhine did not preserve any of her issues. There is no transcription of the trial. They were not raised in her motion for new trial. (CR 60.) She did not raise them in her amended brief in the Fort Worth Court of Appeals. (Ms. Rhine's "Amended Brief" was tendered 6-11-07 and officially filed 8-27-07.) She did not raise them at the June 25, 2007, abatement hearing, the purpose of which was to determine whether she should be appointed appellate counsel. (CR Supp. 2 (6-8-08 order regarding appointment of appellate counsel).) (RR 10-11.) She did not raise them in her petition for review to the Supreme

Court of Texas. (6-16-08 Tx. S. Ct. "Petition for Review" *passim*.)

Regarding the absence of a transcription of the trial (the Reporter's Record), as the opinion of the Fort Worth Court of Appeals noted, Ms. Rhine never complained. *In re J.C.*, 250 S.W.3d 486, 488 n.3 (Tex. App. – Fort Worth 2008, pet. denied) (writ of certiorari pending). In an April 17, 2007, letter from the Fort Worth Court of Appeals to Ms. Rhine, the court warned Ms. Rhine that the court reporter had informed it that Ms. Rhine had neither requested nor made arrangements to pay for the Reporter's Record and that if she did not request the Reporter's Record and make payment arrangements, the appeal would proceed without a Reporter's Record. (4-17-07 letter attached as Appendix A.) Even assuming Ms. Rhine lacked the sophistication to prosecute an appeal pro se, the letter from the Fort Worth Court of Appeals was designed to alert her to problems and even provided her the information she needed to address them. Ms. Rhine did not take advantage of the court's letter.

Regarding payment for the Reporter's Record, indigence is not necessarily an all-or-nothing proposition. The trial court had the authority to order a partial payment of costs. Tex. R. App. P. 20.1(k). The trial court's order effectively found Ms. Rhine indigent for purposes of paying the filing fees and for paying for the Clerk's Record. (CR 64.) In Ms. Rhine's pro se "Petition for Review" before the Supreme Court of Texas, she stated, "And due to the records being

sealed by the time [she] had the funds necessary she could not obtain the reporter[']s record." (6-16-08 Tx. Sup. Ct. "Petition for Review" p. 10.) The trial court ordered the records sealed on March 7, 2007. (CR 63.) In other words, Ms. Rhine admitted having the funds necessary to pay for the Reporter's Record some time after March 7, 2007. This is one month before the April 17, 2007, letter from the Fort Worth Court of Appeals informing her she needed to request the Reporter's Record and make arrangements to pay for it, two months before she filed her original May 30, 2007, brief, and three months before she tendered her amended brief on June 11, 2007. The Fort Worth Court of Appeals waited until August 27, 2007, to order her amended brief filed. The Fort Worth Court of Appeals was ostensibly waiting to see if Ms. Rhine would file the Reporter's Record late. A catty assessment of this situation is that Ms. Rhine had no compunctions about spending other people's money fighting the termination but retained reservations about spending her own. Another possible inference is Ms. Rhine did not want the Fort Worth Court of Appeals to review the Reporter's Record. Whether intended or not, Ms. Rhine has gotten far more sympathy and leverage from the absence of the Reporter's Record.

As a general rule, appellate courts do not address issues not preserved at trial. *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2618, 171 L. Ed. 2d 570 (2008); *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). Texas

plays by the same rules. *In re B.L.D.*, 113 S.W.3d 340, 354-55 (Tex. 2003), *cert. denied*, 541 U.S. 945, 124 S. Ct. 1674, 158 L. Ed. 2d 371 (2004); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (equal protection and due process). Ms. Rhine's complaints were not preserved.

When a party does not raise a constitutional claim in the trial court or in the court of appeals but waits to raise it for the first time in the state supreme court, and when the state supreme court denies discretionary review, this Court has written that the state supreme court has effectively expressed no view on the merits. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). The party has effectively raised no substantive constitutional claim in the state courts, and it is left with no state court having addressed its claim. *Yee*, 503 U.S. at 533. With very rare exceptions, this Court has refused to consider claims that were neither raised nor addressed in the state courts. *Yee*, 503 U.S. at 533.

As recently as 2003, the Supreme Court of Texas addressed whether due process required appellate review of certain unpreserved complaints in parental rights termination cases. *B.L.D.*, 113 S.W.3d at 351-52. The Supreme Court of Texas did not categorically prohibit review of unpreserved error but looked at a number of factors. *B.L.D.*, 113 S.W.3d at 352-54. The court relied on such United States Supreme Court precedents as *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v.*

Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); and *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *B.L.D.*, 113 S.W.3d at 352-55. The court looked at such factors as whether the unpreserved error might result in a reversal of a judgment to terminate, whether the unpreserved error bore on the accuracy of the verdict, the state's strong interest in ensuring trial courts have the first opportunity to correct errors as a matter of judicial economy, the concern for preventing children's lives from remaining in legal limbo, and the risk the unpreserved complaints would cause a parent to be erroneously deprived of her children. *B.L.D.*, 113 S.W.3d at 352-53. Accordingly, the Supreme Court of Texas was keenly sensitive to the issues Ms. Rhine sought to present notwithstanding the fact Ms. Rhine had not preserved any of them. The Supreme Court of Texas on August 25, 2008, specifically referred the matter to the State Bar of Texas Appellate Section's Pro Bono Committee so that Ms. Rhine could obtain counsel pro bono. Ms. Rhine obtained a well-respected attorney. The Supreme Court of Texas asked for and got briefs on the merits from both parties while both were represented by counsel. Ms. Rhine's pro bono counsel even filed a reply brief on January 6, 2009. After reviewing the briefs on the merits and the reply brief, the Supreme Court of Texas declined to hear the case.

At least in the context of federal appellate courts, this Court recognized whether an appellate court deviates from the preservation-of-error requirement is a matter left primarily to the discretion of the appellate courts, to be exercised on the facts of the individual cases. *Exxon Shipping Co.*, 128 S. Ct. at 2618; *Singleton*, 428 U.S. at 121. Although the Supreme Court of Texas did not issue an opinion, it denied the petition for review after reviewing the briefs on the merits and a reply brief. The *B.L.D.* opinion out of the Supreme Court of Texas shows it would have denied the petition only after serious consideration. According to *Yee*, when a state supreme court denies discretionary review, as the Supreme Court of Texas did here, the constitutional claims have effectively never been raised or addressed in the state courts, and, "with very rare exceptions," this Court refuses to consider such claims. *Yee*, 503 U.S. at 533. The Deatons respectfully ask this Court to abide by the decision of the Supreme Court of Texas not to review this case.

(2) The results are sufficiently reliable.

(3) Ms. Rhine has not shown counsel would have made a determinative difference.

When determining whether the failure to appoint counsel resulted in a due process violation, this Court looked at whether the presence of counsel could have made a determinative difference. *Lassiter*, 452 U.S. at 32-33. The Deatons contend that, even on this record,

the results are sufficiently reliable and that the presence of counsel could not have made a determinative difference.

What Happened in Dallas County

J.C. was born August 10, 2004, and on August 16, 2004, in Dallas County, the Department of Family and Protective Services (the Department) removed J.C. because she tested positive for cocaine and PCP. (CR 8.) Ms. Rhine either fought the removal and lost or conceded the removal was proper. Regardless, the case remained alive in Dallas County for approximately another year and a half. (CR 8.) Here is the first indication of reliability: Ms. Rhine gave birth to a child who tested positive for drugs, the Department removed J.C., and the case remained open.

In Texas, when the government (here the Department) removes a child and seeks termination, it has a one-year deadline to resolve the case or return the child. TEX. FAM. CODE § 263.401(a). With a removal on August 16, 2004, the first deadline was the first Monday after the first anniversary of the appointment of the Department as temporary managing conservator. TEX. FAM. CODE § 263.401(a). This would have placed the first dismissal date on or about August 16, 2005.

The one-year dismissal deadline is not a hard deadline. A 180-day extension is possible. TEX. FAM. CODE § 263.401(b). That would have pushed the dismissal deadline to February 12, 2006, or thereabouts.

The record suggests there was a 180-day extension in the Dallas County suit because the suit continued after August 2005. (CR 8.) The extension suggests two things: (1) Ms. Rhine had not persuaded the Department or the trial court to return J.C. to her after one year, and (2) the Department was willing to work with Ms. Rhine another six months. Here is another indication of reliability. Ms. Rhine had eighteen months to get her child back with the assistance of counsel. Notwithstanding the eighteen months, and notwithstanding the assistance of counsel, she failed to persuade the Department or the trial court to return her child to her.

The Department and Ms. Rhine entered a mediated agreement. (CR 8.) We do not know the substance of the mediated agreement because it is not part of the record. On page 3 of the petition, Ms. Rhine asserts the agreement was "binding and irrevocable." (Pet. p. 3.) Because the mediation agreement is not in the record, there is no basis for using quotations. The mediation agreement might well have contained that language, but there is no way to know on this record. Ms. Rhine contends if she performed certain tasks, the Department agreed to return J.C. to her. (Pet. p. 3.) The converse was true as well. If she failed to perform those tasks, the Department could terminate her parental rights in an expedited manner. Ms. Rhine executed an affidavit of relinquishment that J.C.'s guardian ad litem held and which the Department could use if Ms. Rhine fell short of complying with her assigned tasks. (CR 8.)

When the Department presented to the judge their mediated agreement for enforcement on January 11, 2006, the Dallas trial court failed to make any findings or rulings. (CR 8.) Ostensibly the trial judge was not willing to either terminate or return J.C. based upon whether Ms. Rhine had or had not jumped through certain hoops. Apparently the trial judge wanted the termination resolved at trial pursuant to the relevant statutes. Here is another indication of reliability. The trial court was not willing to resolve J.C.'s fate summarily pursuant to the mediation agreement.

On page 4 of the petition, Ms. Rhine asserts that the Department apparently thought better of the settlement agreement and, implicitly, tried to circumvent it. (Pet. p. 4.) The Deatons contend the record does not support this. The Deatons' understanding is the Department was attempting to terminate Ms. Rhine's parental rights pursuant to the settlement agreement and Ms. Rhine was simultaneously trying to have J.C. returned to her for the same reasons. (CR 8.) Ms. Rhine apparently perjured herself in an attempt to show compliance with the conditions of the mediated settlement agreement. (CR 8.) From the Deatons' perspective, Ms. Rhine dodged a bullet when the trial court refused to enforce the settlement agreement.

By this time (January 11, 2006), the Department was fast coming upon its eighteen-month mandatory statutory dismissal deadline (around February 12, 2006). (CR 8.) TEX. FAM. CODE § 263.401(b), (c). It is

not clear whether the Department was unable to obtain a trial date on such short notice. If one of the parties had requested a jury trial, this presumably would have made obtaining a trial date that much more difficult.

In any event, the Department was facing an imminent involuntary dismissal. TEX. FAM. CODE § 263.401(c). The Department could potentially refile a petition after the dismissal, provided it had new facts. *In re L.J.S.*, 96 S.W.3d 692, 694 (Tex. App. – Amarillo 2003, pet. denied). In other words, the Department could have dismissed its case (or had its case dismissed involuntarily), could have returned J.C. to Ms. Rhine, and thereafter could have initiated a new removal and refiled a new case – provided it was willing to play Russian roulette with J.C.'s safety.

On January 19, 2006, eight days after the Department and Ms. Rhine's attempt to implement the mediated settlement agreement failed, the Deatons, J.C.'s foster parents, intervened in the Dallas County suit, but the Dallas trial court struck their intervention. (CR 8.) Had the Dallas trial court not stricken the Deatons' intervention, the case would have proceeded in Dallas County. *In re D.D.M.*, 116 S.W.3d 224, 231-32 (Tex. App. – Tyler 2003, no pet.). If the case did not remain in Dallas County, it was not through lack of effort on the part of the Deatons. They tried.

If the Deatons had succeeded in intervening in Dallas County, there is no statutory mandatory

dismissal deadline for private terminations. If the Deatons had succeeded in intervening in Dallas County, the Department would have dropped out when its mandatory dismissal deadline ran out on or about February 12, 2006. If the Deatons had succeeded in intervening in Dallas County, and if the Department's suit was dismissed, as it should have been under section 263.401(c) of the Texas Family Code, the question of whether Ms. Rhine was entitled to appointed counsel at the county's expense would have arisen again. Ms. Rhine had appointed counsel at the county's expense only by virtue of the Department's having brought the termination proceeding. TEX. FAM. CODE § 263.401(c). The Department would have no longer been a party to the suit. The trial court was statutorily prohibited from using county or state funds to pay for Ms. Rhine's attorney in a private termination proceeding. TEX. FAM. CODE § 107.015(c). If Ms. Rhine continued with court appointed counsel paid for by the county, it would have been only through oversight. Trial courts have budgets too, and the odds of the trial court missing an opportunity to take an attorney off the county payroll were minute. Consequently, the subsequent switch to Tarrant County (the "coordinated maneuver") changed only the location of where the decision whether to appoint counsel was made once the termination proceeding became private. To the extent Ms. Rhine was under the impression she would have necessarily kept her counsel if the case had remained in Dallas County, that is not true. It is false.

On page 12 of the petition, Ms. Rhine asserts the "coordinated maneuver" was chicanery and a conspiracy to deprive Ms. Rhine of counsel. (Pet. p. 12.) As explained above, this is inaccurate. If the Deatons had successfully intervened in Dallas County, once the Department was statutorily forced out of the suit, the question of appointed counsel would have resurfaced. Additionally, foster parents, such as the Deatons here, take enormous financial risks by pursuing a private termination proceeding when the Department will soon be dismissed from the suit. As will be shown below, the trial court in Tarrant County could have appointed counsel to Ms. Rhine at the Deatons' expense. To protect J.C., the Deatons took a tremendous financial risk – not to mention a tremendous emotional commitment – when they could have very easily done nothing and blamed the Department when J.C. was returned to Ms. Rhine and subsequently neglected or abused. The danger under the current statutes is not that foster parents and the Department will conspire to deprive parents of counsel. The danger here is the Department may initiate termination proceedings only to later dump them on private parties and, in this manner, spare the state the financial expense and the Department the trouble of prosecuting the matter to its conclusion. Given the financial exposure, and given the allegations of bad faith, villainy, and baby-stealing that inevitably come with foster parent interventions, it is fair to say foster parents undertake private termination proceedings only if they genuinely fear for a child's safety. The foster parents

are, after all, the only people who actually live with the child on a day-to-day basis. It is one thing to take a calculated risk with a child you do not know. It is another thing to watch someone else take a calculated risk with a child you know and love.

How the Case Ended Up in Tarrant County

At this juncture, knowing the Deatons were willing to intervene, the Department was no longer left with the prospect of playing Russian roulette with J.C.'s safety. Instead, the Department was left with the prospect of a private termination proceeding picking up where its own suit had ended. The Deatons too had to make a choice. If they did nothing, the Department's case would get dismissed, and J.C. would be returned to Ms. Rhine. Absent concerns for J.C.'s safety in Ms. Rhine's care, this option would have been acceptable. That is what foster parents do. But there were serious concerns. (CR 8-10.) The Deatons opted not to abandon J.C. to her fate.

The Department was in a position to render the Deatons powerless. The Department could have returned J.C. to Ms. Rhine and dismissed its suit. Because the Dallas trial court struck the Deatons' petition in intervention, the Deatons would have been helpless to prevent that. The Department, however, chose a different path. The Department's decision speaks volumes about its assessment of the case. The Department coordinated the dismissal of its suit with the subsequent filing of the Deatons' private

termination proceeding in Tarrant County, which was where the Deatons and J.C. lived. This is the "coordinated maneuver" about which the Fort Worth Court of Appeals and Ms. Rhine speak. This too weighs in favor of reliability, because the Department could have facilitated the return of J.C. to Ms. Rhine but chose not to. Ms. Rhine would attribute this to spite. The Deatons would attribute this to a genuine concern for J.C.'s safety.

The "coordinated maneuver" looks underhanded and outcome determinative. It was neither. Once the Department dismissed its suit, the only county in which the Deatons could have filed their suit was in Tarrant County. The Deatons had to file their suit in the county in which J.C. resided, and the Deatons and J.C. lived in Tarrant County. TEX. FAM. CODE § 103.001(a). As noted earlier, if the Deatons had successfully intervened in the Dallas County suit, the question of whether Ms. Rhine should have appointed counsel and at whose expense would have arisen once the Department's case was dismissed. Filing the suit in Tarrant County changed nothing regarding the gaining or losing of her appointed counsel. Filing the suit in Tarrant County and the simultaneous loss of her appointed attorney gave Ms. Rhine the false impression the filing of the petition in Tarrant County was done for the purpose of depriving her of appointed counsel. The Tarrant County judge might have appointed counsel to Ms. Rhine. No one knew. The "coordinated maneuver" should not count against the reliability of the result. The "coordinated

maneuver" ensured that J.C. was not returned to Ms. Rhine through procedural default and ensured a judge made a decision based on the merits of the case. The Deatons and the Department made no attempt to conceal or camouflage the "coordinated maneuver." It was a legitimate legal maneuver. The purpose was to protect J.C. It was a legitimate legal maneuver that worked.

The Deatons' petition in Tarrant County offers the first glimpse showing what motivated them initially to try to intervene in the Dallas County suit and to later file an original petition in Tarrant County. Ms. Rhine had serious issues that translated into instability and danger for J.C. We do not have a transcription of the trial, but we do have the affidavit supporting the Deatons' petition to terminate. Presumably this is precisely where the evidence went at trial. The Deatons present these allegations not to denigrate Ms. Rhine. The Deatons present these allegations to show why they feared for J.C.'s safety.

J.C. was born positive for cocaine and PCP. (CR 8.) Ms. Rhine provided no prenatal care. (CR 9.) After giving birth to J.C., Ms. Rhine gave both the hospital and the Department a false name. (CR 8.) Ms. Rhine had provided incorrect information about the identity of J.C.'s birth father. (CR 8.) Ms. Rhine had convictions for forgery, identity theft, failure to identify, and fraud. (CR 8.) Ms. Rhine engaged in physical altercations and made violent threats. Whataburger terminated her because of a physical altercation with another employee. (CR 8.) Griff Hamburgers

similarly terminated Ms. Rhine because of a physical altercation with another employee. (CR 8.) Ms. Rhine, in a letter to J.C., said she would do her best to kill J.C.'s birth father if Ms. Rhine were not in jail. (CR 9.) Ms. Rhine admitted to the first foster parent that she smoked marijuana while pregnant. (CR 9.) Ms. Rhine tested positive for PCP when J.C. was born. (CR 9.) Two months after Ms. Rhine gave birth to J.C., Ms. Rhine was convicted for driving while intoxicated. (CR 9.) J.C. was born premature. (CR 9.) J.C. required physical therapy. (CR 9.) J.C. did not start walking until she was sixteen months old. (CR 9.) J.C. was speech delayed and was scheduled to receive speech therapy. (CR 9.) The Deatons were not going to return this child to Ms. Rhine without first having a court review the case. J.C. needed a safe, dependable, and permanent home. The Deatons could provide a safe, dependable, and permanent home. Here are more indications of reliability. The allegations were far more serious than a failure to occasionally change a diaper.

Regarding the Appointment of an Attorney for J.C.

The Deatons, in their February 3, 2006, "Original Petition" in Tarrant County, specifically asked the trial court to appoint an attorney/guardian ad litem for J.C. (CR 7.) The appointment of a guardian ad litem and an attorney ad litem for J.C. is mandatory in a termination suit brought by a governmental entity. TEX. FAM. CODE §§ 107.011, 107.012. In a

private termination, the trial court retains a sliver of discretion. TEX. FAM. CODE § 107.021. Specifically, the Texas Family Code provides:

> (a-1) In a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint one of the following:
>
> (1) an amicus attorney; or
>
> (2) an attorney ad litem.

TEX. FAM. CODE § 107.021(a-1). The Deatons specifically wanted J.C. to have a separate voice, and the trial court agreed. The court appointed an attorney/guardian ad litem for J.C., and J.C.'s attorney/guardian ad litem filed an answer on her behalf. (CR 28.) Here is another indication of reliability. Someone other than the Deatons had an attorney and a voice speaking specifically on behalf of J.C. J.C.'s attorney ad litem was free to side with Ms. Rhine if the facts warranted it.

The trial court's January 7, 2007, judgment shows the trial court ordered the Deatons to pay the attorney's fees for J.C.'s attorney/guardian ad litem in the amount of $5,566.25. (CR 56.) Not once in all these proceedings has the attorney ad litem spoken up to protest the termination. If the attorney ad litem disagreed with the result, she was in a position to

fight it. She did not. Here is another indication of reliability.

One can cynically suggest the attorney ad litem for J.C. was paid for by the Deatons and would, therefore, side with them. That argument could be used as well when the state pays for the child's attorney ad litem when the Department sues for termination. The attorney ad litem owes her client undivided loyalty. TEX. FAM. CODE § 107.001(2). Sections 107.003 and 107.004 of the Texas Family Code set out the duties of an attorney ad litem for a child. TEX. FAM. CODE §§ 107.003-.004. Needless to say, selling the child's interests out to the party paying the attorney's fees is not listed as one of those duties. As shown below, if the trial court had appointed an attorney to Ms. Rhine, the Deatons would have been the ones paying for her as well. That the Deatons paid for the services of J.C.'s attorney ad litem does nothing to undermine the reliability of the process.

Regarding the Appointment of an Attorney for the Missing Father

The Deatons did not request the appointment of counsel for Ms. Rhine or J.C.'s alleged birth father. The alleged birth father identified in the Deatons' petition was the third name given by Ms. Rhine. (CR 8.) Ms. Rhine apparently voluntarily abandoned the name of the first alleged birth father, and DNA

proved Ms. Rhine's second alleged birth father was not J.C.'s actual father. (CR 8.)

Ms. Rhine, in her "Brief on the Merits" in the Supreme Court of Texas, noted the trial court appointed counsel to represent the alleged birth father but did not appoint counsel to represent her. (Tx. S. Ct. BOM, pp. 3-4.) The alleged birth father was cited by publication, and the trial court appointed an attorney to help locate him. The alleged birth father's appointed attorney filed an answer in which he informed the court the alleged birth father's location was still unknown. (CR 46.) In a termination suit brought by "a governmental entity," appointment of counsel to a parent served by citation by publication is mandatory. TEX. FAM. CODE § 107.013(a)(2). Although this termination suit was not brought by "a governmental entity," the trial court appears to have appointed counsel to the alleged birth father because the appointment of counsel to a missing father under these circumstances was implied as mandatory. TEX. FAM. CODE § 161.002(e) (when alleged birth father has not registered with the paternity registry, when his location is unknown, and when he is cited by publication, statute assumes father has attorney ad litem who has exercised due diligence in attempting to identify and locate the alleged father). (Effective September 1, 2007, this language was deleted from section 161.002(e). 80th Leg., R.S., (2007), H.B. 3997.) In any event, no one complained. The judgment also shows the Deatons were ordered to pay the attorney's

fees for the alleged father's appointed attorney in the amount of $1,200. (CR 56.) That the Deatons paid for the birth father's attorney does nothing to undermine the reliability of the proceedings.

Regarding the Possible Appointment of Counsel to Ms. Rhine

Regarding the possible appointment of counsel for Ms. Rhine, section 107.001(2) of the Texas Family Code provides: "'Attorney ad litem' means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." TEX. FAM. CODE § 107.001(2). When the code refers to an "attorney ad litem," it is not limiting that term strictly to attorneys representing children. This provision was apparently included to ensure the definition was sufficiently broad to include attorneys representing children.

Section 107.021 provides:

DISCRETIONARY APPOINTMENTS

(a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint one of the following:

> (1) an amicus attorney;
>
> (2) an attorney ad litem; or
>
> (3) a guardian ad litem.

TEX. FAM. CODE § 107.021(a). The unrestricted reference to the appointment of an attorney ad litem is broad enough to encompass the appointment of counsel for a parent. Additionally, section 107.021(a-1), which was quoted earlier, specifically addresses the appointment of counsel for children, so section 107.021(a) would appear to apply to appointments to persons other than children. TEX. FAM. CODE § 107.021(a-1). The Deatons conclude the Texas Family Code contemplates the appointment of counsel for parents in private termination proceedings.

Section 107.021 thereafter provides:

> (b) In determining whether to make an appointment under this section, the court:
>
> (1) shall:
>
> (A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and
>
> (B) balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment;

> (2) may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child; unless the appointment is otherwise required by this code; and
>
> (3) may not require a person appointed under this section to serve without reasonable compensation for the services rendered by the person.

TEX. FAM. CODE § 107.021(b). These provisions contemplate the appointment of counsel for one party at another party's expense.

Section 107.015 provides:

> ATTORNEY FEES
>
> (a) An attorney appointed under this chapter to serve as an attorney ad litem for a child, an attorney in the dual role, *or an attorney ad litem for a parent* is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent.
>
> (b) [Discussion of payment of fees for child's attorney.]
>
> (c) If indigency of the parents is shown, an attorney ad litem appointed to represent a child or parent in a suit filed by a governmental entity shall be paid from the general funds of the county according to the fee schedule that applies to an attorney appointed to represent a child in a suit under

> Title 3 as provided by Chapter 51. *The court may not award attorney ad litem fees under this chapter against the state, a state agency, or a political subdivision of the state except as provided by this subsection.*

TEX. FAM. CODE § 107.015 (emphasis added). The italicized portion of subsection (a) is sufficiently broad to encompass the appointment of counsel to an indigent parent in a private termination proceeding. The italicized portion of subsection (c) expressly prohibits the award of attorney's fees against the state or its subsidiaries except in suits "filed by a governmental entity." Any award of attorney's fees in a private termination proceeding would necessarily have to come from one of the other parties.

Taking these statutes collectively, the Texas statutes do not prohibit the appointment of counsel to indigent parents in private termination proceedings. They do prohibit the appointment of counsel at the state's or county's expense. They appear to authorize the appointment of counsel at the expense of some other party to the suit. In short, if the trial court had appointed Ms. Rhine counsel, it could have done so only if it ordered the Deatons to pay for her attorney. The Deatons would have had to finance the prosecution of their suit. The Deatons would have also had to finance the defense against the prosecution of their suit. Such an order might have made the costs of the suit prohibitive to the Deatons.

Two other statutes deserve quick attention. Section 107.022 discusses prohibited appointments.

TEX. FAM. CODE § 107.022. The appointment of counsel to indigent parents in private termination proceedings is not among the prohibited appointments. TEX. FAM. CODE § 107.022. Section 107.023 is captioned "Fees in Suits Other than Suits by Governmental Entity." TEX. FAM. CODE § 107.023. This section appears to govern the payment of attorneys ad litem, guardians ad litem, or amicus attorneys for the child in private termination proceedings. TEX. FAM. CODE § 107.023. Once again, the statute expressly prohibits assessing awards against the "state, a state agency, or a political subdivision of the state." TEX. FAM. CODE § 107.023(c).

What Happened in Tarrant County

Ms. Rhine filed a pro se answer and cross-petition. (CR 23-27.) No one would be taking a default judgment against her. Ms. Rhine did not request the appointment of counsel. (CR 23-27.)

On July 30, 2006, Ms. Rhine wrote the trial court and requested the appointment of counsel because she was indigent. (CR 40.) This document is a letter to the trial court. It is not a motion. There is no request for a hearing. (CR 40-44.) The court of appeals also describes this document as "a letter to the trial court." *J.C.*, 250 S.W.3d at 488. In her "Brief on the Merits" before the Supreme Court of Texas, Ms. Rhine herself refers to the document as a letter to the court. (Tx. S. Ct. BOM, p. 3.) The docket sheet

does not show any hearing or any ruling on a request for appointed counsel for Ms. Rhine. (CR 58-59.)

The trial was on November 6, 2006. (CR 54, 58.) Here is an indication of reliability. The trial court heard evidence. The judgment was signed January 7, 2007. (CR 57.)

If the trial court, after hearing the evidence, concluded the Deatons were railroading Ms. Rhine, or if the trial court simply felt the appointment of counsel to Ms. Rhine would better develop the case, the trial court was free to grant a new trial on its own motion. Tex. R. Civ. P. 320. The trial court did not do that. Here is another indication of reliability.

Regarding the Possible Appointment of Appellate Counsel

On page 5 and 6 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals abated the appeal for an indigency hearing. (Pet. p. 5-6.) This is incorrect. The Fort Worth Court of Appeals structured its order so that indigency was already established in Ms. Rhine's favor but for the cost of the Reporter's Record. (CR Supp. 2.) The Fort Worth Court of Appeals abated the appeal to determine whether the trial court would appoint Ms. Rhine an appellate attorney in its discretion. (CR Supp. 2.) That is how the trial court understood the matter. (RR 3.) The trial court was aware the county could not pay for her attorney's fees. (RR 12.) The Deatons specifically

asked that they not have to finance her attorney's fees. (RR 10.)

Regarding the Reporter's Record

Regarding the lack of a free Reporter's Record, on pages 6 and 7 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals acknowledged but ignored this due process violation. (Pet. pp. 6-7.) The opposite is true. Far from ignoring the violation, the Fort Worth Court of Appeals pointed it out to Ms. Rhine. *J.C.*, 250 S.W.3d at 488 n.3. Ms. Rhine had already shown the ability to file a timely motion for new trial. (CR 60.) There was no reason to suspect she could not file a timely motion for rehearing. Tex. R. App. P. 49. This was the Fort Worth Court of Appeals' way of telling Ms. Rhine to file a motion for rehearing and regurgitate footnote three back to the court, and, one way or another, she would get a "free" Reporter's Record. Inexplicably Ms. Rhine did not file a motion for rehearing. The same pro se litigant who managed to file a timely motion for new trial in the trial court, who managed to timely perfect her appeal to the Fort Worth Court of Appeals, who managed to timely file her petition for review in the Supreme Court of Texas, and who boldly warned the trial judge she was taking this matter up to the Supreme Court (and succeeded) neglected to file a motion for rehearing alleging an error that guaranteed success. (RR 12.) Once again, the Deatons assert that if this case has no Reporter's Record, it is because Ms. Rhine does not want the courts to see it. Ironically, her case

has always been stronger without a Reporter's Record.

On page 14 of the petition, Ms. Rhine asserts the Fort Worth Court of Appeals should have corrected the error on its own and not required Ms. Rhine to complain. (Pet. p. 14.) The justices of the Fort Worth Court of Appeals do not represent the parties before them. Under the circumstances, after pointing the error out to Ms. Rhine, it was not too much to ask Ms. Rhine to make the complaint herself. She did not.

In the event the Court orders the preparation and filing of the Reporter's Record, the Deatons ask that the Court specify who has to pay for it. A ruling that Ms. Rhine is entitled to a free reporter's record means Ms. Rhine is entitled to a reporter's record at no charge to her; it does not mean the reporter's record is free. Someone will end up paying for it. Inasmuch as Ms. Rhine does not appear to be proceeding as an indigent in this Court, Ms. Rhine would appear to have some financial backing at this time and would appear to be able to pay for it. Additionally, to the extent possible, the Deatons would ask the Court to resolve any remaining issues here rather than remand the cause back to the court of appeals. *See, e.g., In re R.R.*, 209 S.W.3d 112, 115-16 (Tex. 2006) (because appeal accelerated, supreme court addressed certain issues rather than remand them back to court of appeals).

Final Comments

The Deatons do not begrudge Ms. Rhine having counsel or an appellate record. The Deatons have resisted having to pay for her counsel and for her appellate record.

The Deatons do not like the appointment statutes any more than Ms. Rhine does. This case started out as a government-initiated suit to terminate Ms. Rhine's parental rights. It was financed by public funds. It became a private termination proceeding financed exclusively by the Deatons. Prosecuting termination proceedings is not the role of foster parents. This asks far too much of foster parents. This case is Exhibit A for why the Texas legislature should change the laws regarding indigent parents in private termination proceedings. To the extent the Court is inclined to hear the case, the Deatons would hope the Court would read her complaints to encompass the prohibition of the use of state funds.

The Deatons contend Ms. Rhine has never had any hope of obtaining the return of her child and that her strategy has always been one of delay and prolongation. As a pro se litigant, she has succeeded exceptionally well in that respect. This case has been going on now for nearly five years – J.C.'s entire life – during which time J.C. has not spent even one day in Ms. Rhine's unsupervised care.

Ostensibly Ms. Rhine did not see her limitations, her instability, or the danger she posed to her own child. The Department saw them. The Department

removed J.C. The Deatons saw them. They were willing to try to intervene in the Dallas County case and file an original suit in Tarrant County. J.C.'s attorney ad litem saw them. The Tarrant County trial judge apparently saw them as well, because he was willing to terminate. Both Ms. Rhine and her child needed help. The Deatons were in a position to help only her child. The Department was in a position to help Ms. Rhine, but after a year and a half, it was still unwilling to return J.C. to her and effectively asked the Deatons to carry the ball once its own statutory deadline expired.

The solution is not to send the case back to the court of appeals to restart the appellate process. The solution is not to send the case back to the trial court for a new trial, after which new appeals will most certainly follow. Ms. Rhine has no chance of persuading a court to return her child to her. Despite that, Ms. Rhine has shown she will never stop fighting. This only introduces instability into J.C.'s life. Protracted litigation is not in J.C.'s best interest.

The solution is to go to the Texas legislature and get the Texas statutes changed. This case should give the Texas legislature plenty to think about. The relevant statutes placed the parties, the trial judges, and the appellate judges all in exceptionally awkward positions. There is now a rallying point from which to argue change.

Termination can mean a parent never sees her child again. It does not necessarily have to mean that.

Given the history and given Ms. Rhine's issues, the Deatons cannot promise anything. The Deatons are, however, not totally unsympathetic to Ms. Rhine. Frightened, yes. Totally unsympathetic, no.

The Attorney General of the State of Texas

In the event this Court grants the petition for writ of certiorari, the Deatons ask this Court to strongly encourage the Attorney General of the State of Texas to file an amicus brief on the merits. The Deatons certainly will. The validity of the statutes is really the State of Texas's fight. The State of Texas provided the statutory framework within which the Deatons, Ms. Rhine, the trial courts, the Fort Worth Court of Appeals, and the Supreme Court of Texas all had to work. The Deatons are loath to defend statutes with which they themselves are unhappy.

CONCLUSION

For all the foregoing reasons discussed above, the "Petition for Writ of Certiorari" should be denied.

Respectfully submitted,

DEAN M. SWANDA
SWANDA & SWANDA, P.C.
Attorneys at Law
109 E. Park Row Drive
Arlington, TX 76010

Telephone (817) 467-4668
Facsimile (817) 465-3779
TX Bar No. 19550620

Counsel for Respondents
Carl and Yolanda Deaton

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP, SUITE 9000
FORT WORTH, TEXAS 76196

tel: (817) 884-1900
fax: (817) 884-1932

www.2ndcoa.courts.state.tx.us

CHIEF JUSTICE
JOHN CAYCE

JUSTICES
TERRIE LIVINGSTON
LEE ANN DAUPHINOT
DIXON W. HOLMAN
ANNE GARDNER
SUE WALKER
BOB MCCOY

CLERK
STEPHANIE ROBINSON

CHIEF DEPUTY CLERK
DEBRA SPISAK

CHIEF STAFF ATTORNEY
JANETTE THOMPSON

April 17, 2007

Tracy Rhine
[Home Address Omitted]
Dallas, TX 75287

RE: Court of Appeals Number: 02-07-00081-CV
Trial Court Case Number: 324-397088-06

Style: In the Interest of J.C., A Child

The court reporter responsible for preparing the reporter's record in this appeal has informed this

court that payment arrangements and designation have not been made for the reporter's record. *See* TEX. R. APP. P. 34.6(b)(1), 35.3(b)(2), (3).

Unless, by **May 02, 2007**, you make payment arrangements and designate to the court reporter **and provide this court with proof of payment and designation**, the court may consider and decide those issues or points that do not require a reporter's record for a decision. *See* TEX. R. APP. P. 37.3(c).

Respectfully yours,

STEPHANIE ROBINSON, CLERK

/s/ Meagan Z. Polk

By: Meagan Z. Polk, Deputy Clerk

CC:

Kellye A. Swanda
Swanda & Swanda, P.C.
109 E. Park Row Dr.
Arlington, TX 76010

Duke Hooten
Appellate Attorney
DFPS MC: E-611
701 W. 51st Street
Austin, TX 78751

Kee A. Ables
Attorney at Law
675 N. Henderson, Ste. 300
Fort Worth, TX 76107

Court Reporter, 324th District Court
Tarrant County Family Law Center
200 E. Weatherford St.
Fort Worth, TX 76196

150

(6)

Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE, PETITIONER

V.

CARL AND YOLANDA DEATON

On Petition For A Writ of Certiorari To The Court of Appeals of Texas Second District

PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO THE STATE OF TEXAS

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Supplemental Brief for Petitioner 1

A. Review Of Ms. Rhine's Claims Is Appropriate Despite Her Failure To Press Them Explicitly In State Court 1

B. Ms. Rhine's Due Process Claim Is Substantial And Has Far-Reaching Implications 7

C. The Texas Scheme Violates The Equal Protection Clause 10

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71 (1988) 2

Bearden v. *Georgia*, 461 U.S. 660 (1983) 10

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 2

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 1-2

Howell v. *Mississippi*, 543 U.S. 440 (2005) 2

Illinois v. *Gates*, 462 U.S. 213 (1983) 2

Lassiter v. *Dep't of Soc. Svcs.*, 452 U.S. 18 (1981) 8, 9, 12

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 6, 9, 10, 12

Pollard v. *United States*, 352 U.S. 354 (1957) 7

Tomkins v. *Missouri*, 323 U.S. 485 (1945) 7

Wood v. *Georgia*, 450 U.S. 261 (1981) 3-5

STATUTES

28 U.S.C. § 1257(a) (2006) 2

TEX. FAM. CODE ANN. § 107.021 (Vernon 2002 & Supp. 2008) 10

PETITIONER'S SUPPLEMENTAL BRIEF

The State asks this Court to apply error-preservation rules to deny review of Ms. Rhine's due process challenge to application of error-preservation rules. The State's argument demonstrates that whether traditional error-preservation standards must sometimes be relaxed to ensure compliance with the Due Process Clause of the Fourteenth Amendment is a mature and fully developed issue with far-reaching implications.

Ms. Rhine contends that the *cumulative* denial of safeguards—not any one of them in isolation—denied her due process. In response, the State deftly severs Ms. Rhine's cumulative argument into its individual components, then dispatches each component piece-meal by terming it "fact-bound" and contending it does not alone constitute a denial of due process. This recasting of Ms. Rhine's argument, while undoubtedly clever and perhaps strategically sound, essentially ignores Ms. Rhine's actual due process claim.

A. Review Of Ms. Rhine's Claims Is Appropriate Despite Her Failure To Press Them Explicitly In State Court.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court adjudicated Clarence Earl Gideon's federal constitutional claims even though he pressed them in the state trial court with a single sentence claiming that "the United States Supreme Court says I am entitled to be represented by counsel" and in his state-court habeas corpus petition with a cursory claim that Florida had deprived him of "rights guaranteed by the Constitution and the Bill

of Rights by the United States Government." *Ibid* at 337.

Ms. Rhine made similar statements in state court, arguing that termination proceedings must meet the "requisites of the due process clause of the Fourteenth Amendment" and be administered "consistent with the due process clause of the Fourteenth Amendment" (Indigency Hearing at 10-11). Like Gideon, Ms. Rhine did not squarely press her constitutional arguments in state court. But also like Gideon, she said enough for the state courts to know those federal constitutional claims were afoot.

Ms. Rhine's case—like Gideon's and others—justifies relaxing this Court's customary insistence that federal claims be squarely pressed or passed upon in state court. Rather than focusing on whether that insistence is jurisdictional or prudential,[1] the real question is whether it should be applied to Ms. Rhine either way. After all, this Court finds exceptions even to entrenched jurisdictional requirements like the final-judgment rule. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 484-86 (1975).

Ms. Rhine's inability to press her constitutional claims relates directly to the very denial of due process she how urges. The State's reading of Section 1257(a) places impecunious litigants like Ms. Rhine in a constitutional Catch-22: the State denies them due process, that due process denial prevents them from pressing their due

---

[1] That question is "unsettled." *Howell* v. *Mississippi*, 543 U.S. 440, 445-46 (2005) (citing *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988)). Some recent decisions appear to treat the doctrine as prudential. *See, e.g., Illinois* v. *Gates*, 462 U.S. 213, 222 (1983).

process claim in state court, and they are then denied federal review of the due process violation based on their failure to press it in state court.

This Court recognized the folly of this constitutional conundrum in *Wood* v. *Georgia*, 450 U.S. 261 (1981). In *Wood*, petitioners were sentenced to probation conditioned on payment of fines. Petitioners failed to pay and the trial court revoked their probation. The state appellate court affirmed the revocations and petitioners sought review by this Court. Petitioners based their state-court appeal and petition for certiorari on equal protection grounds. *Ibid* at 262. But this Court identified a potential conflict of interest involving petitioners' counsel substantial enough to implicate due process and right-to-counsel concerns. This Court vacated petitioners' convictions and remanded the case with instructions that the state court determine whether the conflict of interest existed at the time of the revocation hearing and, if so, conduct a new hearing. *Ibid* at 273-74.

Because the *Wood* petitioners never raised any due process issue, Justice White argued that this Court lacked jurisdiction. *Ibid* at 277-79 (White, J., dissenting). The majority rejected that argument because the lawyer "who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused" and was unlikely to "concede that he had continued improperly to act as counsel." *Ibid* at 265 & n.5. In other words, the due process deficiency itself was responsible for petitioners' failure to press it in state court—just as with Ms. Rhine.

The State contends *Wood* differs factually from this case because the due process challenge in

Wood was "based on a defect in state proceedings that *affirmatively prevented* the parties from pressing the claim," namely their own lawyer's conflict of interest (State's Brief at 13 n.3). This purported distinction is vital to the State's argument that Ms. Rhine could have pressed her constitutional claims because "unrepresented litigants are fully capable of preserving their constitutional rights during trial and on appeal" (State's Brief at 13). But nothing prevented the *Wood* petitioners from raising their due process arguments—nothing, that is, but their lack of legal acumen or effective counsel. No state procedure stood in their way. This Court acknowledged as much by citing petitioners' lack of sophistication and resources in relaxing usual presentation requirement: "Petitioners were low-level employees, and now appear to be indigent . . . We cannot assume that they, on their own initiative, were capable of protecting their interests." *Ibid* at 265 & n.5.

Like the *Wood* petitioners, Ms. Rhine could—in theory—have pressed her claims; no state procedural rule barred her from doing so. But also like the *Wood* petitioners, nothing would lead this Court to adjudge Ms. Rhine—an indigent woman most recently employed as a fast-food worker—capable of protecting her constitutional interests.[2]

---

[2] The State's other arguments are similarly unavailing. While *Wood* did not concern any challenge to a state statute, it challenged a state judicial decree, thus implicating the federalism concerns present in any federal review of state statutes or judicial pronouncements. And while *Wood* involved a second constitutional claim, this Court did not—contrary to the State's claim—base its exercise of jurisdiction on that claim. Indeed, the majority's discussion of jurisdiction does not even mention the other claim. *Wood*, 450 U.S. at 265 & n.5.

In exercising jurisdiction in *Wood*, this Court also deemed the due process issue raised in state court—even though petitioners never once mentioned it. Other parties pointed out the possible conflict of interest to the trial court, so that court knew of the factual foundation for what became the due process argument. Consequently, this Court found it "appropriate to treat the due process issue as one 'raised' below, and proceed to consider it . . . ." *Ibid* at 265 & n.5. Similarly, Ms. Rhine informed the trial and appellate courts of the factual foundation for her claims, namely her lack of counsel and even surpassed the *Wood* petitioners by mentioning the Due Process Clause.

Nothing in the policies underlying the presentation requirement justifies its application in this case. Contrary to the State's claim, Texas courts were not *deprived* of the first opportunity to consider the Texas statutes in light of Ms. Rhine's challenge. The Texas Supreme Court had that opportunity and *chose* not to exercise it—with full knowledge of Ms. Rhine's federal claims. Rejection of discretionary review may not satisfy the presentation requirement, but it is surely apposite in evaluating the policy reasons underlying that requirement. Ms. Rhine beseeched the Texas Supreme Court to hear her claims; it declined to do so. Its highest court having declined the opportunity to consider Ms. Rhine's claims, the State cannot now complain on policy grounds of its judiciary lacking the chance to exercise its role in our federal system.

Likewise, no practical considerations weigh against granting Ms. Rhine's petition. The State contends a better-developed record might resolve a dispute over whether Ms. Rhine could have afforded

the record but chose not to pay for it, or was denied the record despite being indigent (State's Brief at 4, 12). But the trial court explained why it was making Ms. Rhine pay for the reporter's record:

> I'll waive all the cost because of your indigency, with the exception of the four hundred and five dollars which would be necessary to pay for the court record and basically to pay for the typing cost so that that court reporter is not out that money. I don't think it's fair for the court reporter to be out four hundred and five dollars for this appeal.

(Transcript at 13). The trial court was protecting the financial interests of its court reporter, and said so explicitly. The trial court's statement inherently invokes this Court's decision in *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996)—as the court of appeals realized.

The Deatons argue that because Ms. Rhine admitted having funds to pay for the record at some unspecified time during the fifteen months between the trial court's indigency order and June 16, 2008, that means she must have been able to afford the record before her brief in the court of appeals was due, almost a year earlier (Brief in Opposition at 5-6). There is no support for this claim in the record, which establishes the trial court denied Ms. Rhine a transcript to prevent the court reporter from working for free.

In granting Ms. Rhine's petition, this Court would be applying its practice in criminal cases of considering the requirement of state-court presentation fulfilled where a pro se petitioner

makes the general substance of the federal claim clear in state court. To require more of a "layman and pauper . . . would compound the injury caused by the original denial of counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 487 (1945). In *Pollard* v. *United States*, 352 U.S. 354 (1957), this Court permitted court-appointed counsel to present questions not raised in state court by the pro se petitioner, even though "[h]ad petitioner been represented by counsel in the courts below and upon his petition for certiorari, we might well have considered those questions neither preserved below nor raised in the petition." *Ibid* at 359.

Applying similar analysis to Ms. Rhine would neither sound a death knell for error preservation nor create a broad rule excusing pro se litigants from ordinary presentation requirements. Ms. Rhine's failure to press her claims resulted from the very due process violation she now urges, which only happens to relate to her lack of counsel. It is this link between the due process violation and the failure to press it—and not merely Ms. Rhine's pro se status—that justifies relaxation of the presentation requirement. The overwhelming majority of pro se litigants—few of whom complain of defects that go to the very heart of their failure to press the defect in state court—would remain subject to ordinary presentation and error-preservation requirements.

B. Ms. Rhine's Due Process Claim Is Substantial And Has Far-Reaching Implications.

Ms. Rhine's contends the *cumulative effect* of denying her almost all safeguards normally associated with termination actions denied her due

process. The State's "sever-and-dispatch" strategy only underscores the seriousness of the cumulative violation.

Ms. Rhine did not receive a trial lawyer despite requesting one repeatedly. And this denial occurred without any *Lassiter* analysis. The State intimates the trial judge considered the *Lassiter* factors or their statutory equivalent (State's Brief at 19). But the trial court made clear it was declining to appoint counsel based not on the exercise of discretion (*Lassiter*-based or otherwise), but on its belief that it lacked such discretion: "Up until 2003, a judge did have the right to actually make a discretionary call as to whether or not an attorney would be appointed . . . but the law is clear that I can't appoint you an attorney" (Indigency Hearing at 11-12). The court explained that "this is not a case filed by a governmental entity and, therefore, there is no basis upon which to appoint an attorney . . . ." (*Ibid* at 13).

The State criticizes Ms. Rhine for failing to cite any applicable *Lassiter* factors in her petition (State's Brief at 18), but does not suggest how she might do so in the absence of a record. This failure simply reinforces Ms. Rhine's acute need for the trial transcript. After all, this Court's searching examination of the trial record in *Lassiter* itself establishes the trial transcript as the touchstone for appellate review concerning the absence of counsel. *See Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 22-24, 32-33 (1981).

Having been denied a court-appointed lawyer without benefit of the *Lassiter* analysis, Ms. Rhine then was adjudged indigent but did not receive a transcript in violation of this Court's decision in

M.L.B. The State blames this not on the trial court's apparent ignorance of *M.L.B.* or on the appellate court's refusal to act despite seeing a constitutional violation, but on Ms. Rhine for failing "to invoke her rights" (State's Brief at 17). But Ms. Rhine *did* invoke her rights. She filed an appeal, sought and established indigency, and requested a record. Here, again, the State's response establishes the propriety of review, this time to amplify and clarify whether any additional action was required of Ms. Rhine to "invoke" the due process right enunciated in *M.L.B.*

Texas courts then denied Ms. Rhine appellate review of her constitutional claims, apparently based on traditional error-preservation standards. The State's assertion of these same error-preservation standards as an adequate and independent state ground begs the question; it is the very application of these standards that is now at issue under the Due Process Clause.

Ms. Rhine's due process claims have far-reaching implications even in states that provide counsel to indigent parents in all termination actions. This case would decide whether the Due Process Clause may sometimes require that traditional error-preservation rules be relaxed in termination proceedings. Independently, the decision in this case would clarify both the actions necessary to trigger the *Lassiter* analysis and whether the right to a trial transcript under *M.L.B.* is complete upon establishment of indigency, filing of an appeal, and a request for the record.

Given the staggering number of children in foster care across this nation and the likelihood of ever-more termination actions, the questions presented by Ms. Rhine are substantial and likely to

recur in courtrooms across the country. As a result, review is appropriate—and desperately needed by indigent parents like Ms. Rhine, who find themselves facing the awesome power of our judicial system, but lacking too many of its vaunted procedural safeguards.

C. The Texas Scheme Violates The Equal Protection Clause.

Ms. Rhine advances an as-applied equal protection challenge to the Texas statutes, which guarantee counsel to indigent parents only in State-initiated termination actions. The Texas statute burdens Ms. Rhine's attempt to exercise a fundamental right, meaning some level of heightened scrutiny is appropriate—just as it was in *M.L.B.* *See* *M.L.B.*, 519 U.S. at 120-21 (citing *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983)).

The Texas statutes vest trial courts with discretion to appoint attorneys in privately-initiated termination actions. But that discretion is far more limited than the State intimates and hardly co-extensive with the Due Process Clause or *Lassiter*. The trial court may appoint counsel only where necessary to determine the best interest of the child. TEX. FAM. CODE ANN. § 107.021 (Vernon 2002 & Supp. 2008). The statute does not permit appointment where the child's best interest may be determined without it—notwithstanding the parent's due process rights.[3]

The Texas scheme draws a distinction that is arbitrary on its face. Texas imposes additional

---

[3] Even that guarantee may be illusory. The trial court made clear that even if it tried to appoint counsel, "the County would not pay for it" (Indigency Hearing at 12).

burdens on indigent parents like Ms. Rhine to obtain the same benefit automatically provided to indigent parents facing State-initiated termination actions. And Texas does this without even a rational basis for treating these similarly-situated citizens differently. The statute is akin to one providing counsel as-of-right to citizens above six feet tall, while making it discretionary for those under six feet tall; or, worse yet, a statute providing the State *must* provide counsel to men, but *may* provide it to women. Neither could survive equal protection analysis under *any* standard of review.

The State's claimed justification for the different treatment of similarly-situated citizens—that only citizens in State-initiated suits face the State's power—is belied by the reality of family law litigation. Even in privately-initiated termination actions, the State is an omnipresent force. In this case, the Deatons obtained standing through the State's action in seizing J.C. and placing her in State-sponsored foster care. Perhaps most critically, in attacking Ms. Rhine, the Deatons relied on evidence gathered by the State and apparently turned over to the Deatons.[4] Ms. Rhine confronted the power of the State at every turn. In any termination action the defending parent is faced with the awesome power of the State, rendering any distinction in treatment based on the filing party arbitrary on its face.

---

[4] Ms. Deaton's affidavit in the clerk's record relies on evidence obtained by the Department (CR at 8-10) and the Deatons' petition included an affidavit from a Department employee and Department documents (CR at 15-19).

CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner Tracy Rhine

(4)

No. 08-1596

Supreme Court, U.S.
FILED
JUL 3 1 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,

Petitioner,

v.

CARL DEATON, ET UX.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals of Texas Second District

PETITIONER'S REPLY TO OPPOSITION

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply Brief for Petitioner 1

A. Applying Traditional Error-Preservation Standards To This Case Violates Due Process 1

B. Even The Deatons Cannot Cite Sufficient Indicia Of Reliability 4

C. Ms. Rhine Cannot Prove Harm Because She Lacks The Trial Transcript 7

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

In re M.S., 115 S.W.3d 534 (Tex. 2003) 2

Lassiter v. *Dep't of Social Services*, 452 U.S. 18 (1981) 1, 6, 7, 8

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 3, 8

STATUTES

TEX. FAM. CODE ANN. § 107.015 (Vernon 2002 & Supp. 2008) 6

MISCELLANEOUS

Kirk Johnson & Dan Frosch, *Sect Children Face Another World, But Still No TV*, N.Y. TIMES, Apr. 26, 2008, *available at* www.nytimes.com/2008/04/26/us/26raid.html.. 5-6

REPLY BRIEF FOR PETITIONER

Ms. Rhine urges due process and equal protection violations in seeking review of this case. The Deatons fail to address Ms. Rhine's equal protection claim. But they point out the damage inflicted by the Texas statutory scheme on all the parties in this case, including J.C., thereby underscoring the need for this Court to grant review and direct Texas to bring its statutory scheme into compliance with the Equal Protection Clause.

The Deatons mount three principal arguments against Ms. Rhine's due process claim. First, they urge this Court to deny review of Ms. Rhine's claim because she failed to raise it in the lower courts. Second, they contend sufficient safeguards ensured the reliability of the termination order. Lastly, they claim that Ms. Rhine cannot show harm resulting from her lack of counsel, basically arguing Ms. Rhine is such a terrible parent that the presence of counsel would not have affected the outcome. But these arguments do not overcome the important reasons for granting review in this case.

A. Applying Traditional Error-Preservation Standards To This Case Violates Due Process.

The Deatons' argument concerning error-preservation begs the question. Ms. Rhine concedes that application of error-preservation rules does not normally violate due process, even in termination proceedings involving *pro se* parties. But to deny appellate review based on error-preservation standards to a *pro se* litigant who defended a termination action without counsel, did not receive the benefit of the *Lassiter* analysis, and was refused

a trial transcript at State expense violates due process. And applying error-preservation standards to deny review of the propriety of applying error-preservation standards creates a circular rule insulating error-preservation decisions from constitutional scrutiny. Though it erred in applying the rule to this case, the Texas Supreme Court has recognized that error-preservation rules must sometimes be relaxed to afford due process. *See In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003).

The Deatons suggest that Ms. Rhine intentionally avoided obtaining the trial transcript as part of a scheme to bolster her constitutional claims. This suggestion is unsupported—and belied—by the record. Ms. Rhine requested leave to proceed on appeal as an indigent, specifically testifying that she could not afford to pay for the reporter's record (CR 52). It was the Deatons who contested that indigency claim. And even if Ms. Rhine—an uneducated hourly-wage fast food worker—were capable of hatching a sophisticated legal strategy to request but somehow avoid obtaining the trial transcript in the hopes of birthing a due process violation, she could not predict that the trial court would find her indigent yet still require that she pay for the reporter's record. And if she had engineered the denial, why then would she fail to raise the issue in her *pro se* appeal and petition for review? In short, the idea that Ms. Rhine somehow engineered denial of the transcript makes no sense when viewed in light of the facts.

Neither did Ms. Rhine simply refuse to pay for the record. The Deatons' claims that Ms. Rhine had the money to pay for the record are incorrect. In June of 2008, Ms. Rhine stated in her petition for

review to the Texas Supreme Court that she eventually raised funds to pay for the reporter's record, but not until after the record was sealed in March of 2007 (Petition for Review at 10). But Ms. Rhine did not state when she actually had the funds; it could have been any time between March of 2007 and June of 2008. And contrary to the Deatons' intimation, Ms. Rhine is not paying any costs in this Court—her lawyers are working for free and paying the expenses in an effort to vindicate Ms. Rhine's constitutional rights and guarantee due process and equal protection to other indigent Texans.

On a different record, the trial court's order requiring Ms. Rhine to pay for the transcript might be defensible as a factual finding that she was only partially indigent for purposes of appeal. But in this case, the trial court explained its reason for ordering Ms. Rhine to pay for the transcript, stating on the record that the decision was based on a desire for the court's reporter to be paid, not "to be out four hundred and five dollars for this appeal." (Transcript at 13).

Finally, nothing in the record indicates the Fort Worth Court of Appeals intended by its footnote citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) to instruct or encourage Ms. Rhine to file a motion for rehearing. If that was the case, it was a curious, disturbing, and ineffective route to take with a clear due process violation involving a *pro se* litigant. The court could simply have addressed the issue on the merits given its constitutional import. If the court was reluctant to do that, it could have made its instruction to Ms. Rhine explicit, stating in the footnote, for example, that the appellate rules permitted Ms. Rhine to file a motion for rehearing

raising the transcript issue. If the court intended for Ms. Rhine to seek rehearing, there was no need to veil that instruction.

Whatever the court's intention, the Deatons' theory that Ms. Rhine intentionally ignored an instruction to file a motion for rehearing is unsupported by the record. The Deatons contend that Ms. Rhine's ability to file a motion for new trial, appellate brief, and petition for review demonstrates her legal acumen. But as noted in the original petition, much of Ms. Rhine's writing borders on being incomprehensible. For example, Ms. Rhine did file what she called a "motion for re-trial" (CR 60) in which she argued:

> I am requesting A re-trial on the grounds I was never granted a hearing on my petitions requesting counsel be Appointed me, this being a termination of parental rights hearing; I was not allowed a hearing for my petition that counsel be appointed me, not being allowed to state my plea.

This motion, which did not cite any legal authority, hardly bolsters the Deatons' claim of Ms. Rhine's legal sophistication.

B. Even The Deatons Cannot Cite Sufficient Indicia Of Reliability.

The Deatons' claims concerning indicia of reliability are curious given the absence of any record of the trial. The Deatons' arguments concerning reliability all either presuppose the propriety of the Department's intervention and the trial court's decree, or assume the trial evidence

tracked accusations made by the Deatons in pre-trial instruments.

In the absence of a trial record there is no way for this Court to evaluate any safeguards supporting the trial court's termination order. We do not know whether the trial court permitted Ms. Rhine to confront the witnesses and evidence against her. We do not know whether the trial court applied the clear-and-convincing-evidence standard. We do not know whether the attorney ad litem for J.C. meaningfully participated in the trial or performed any pre-trial investigation. In short, there is no record of the safeguards normally present in a termination action. Yet we do know that Ms. Rhine did not have a lawyer, did not receive a transcript, and did not review substantive appellate review.

None of the indicia of reliability cited by the Deatons actually support the reliability of the trial court's decision. They instead presuppose the propriety of the Department's intervention and the trial court's decree, essentially arguing that the trial court's decree was reliable because it was correct. Certainly none of the purported indicia of reliability replaces the crucial bulwark against erroneous deprivations formed by appellate review.

The Deatons contend that two important indicators of reliability are the Department's removal of J.C. from Ms. Rhine's custody, and the Department's decision not to dismiss the case against Ms. Rhine but instead to ask the Deatons to file a case in Fort Worth. Again, these presuppose that the Department was correct in its assessment. This cannot be assumed in a child welfare system that remains "underfinanced and understaffed in the best of times, dysfunctional in the worst." Kirk

Johnson & Dan Frosch, *Sect Children Face Another World, But Still No TV*, N.Y. TIMES, Apr. 26, 2008, *available at* nytimes.com/2008/04/26/us/26raid.html.

Similarly, there is no record that the "trial court heard evidence" at trial. And as Ms. Rhine noted in her original petition to this Court, Texas trial courts make mistakes in termination orders even after hearing evidence and applying the clear-and-convincing-evidence standard (Petition for *Certiorari* at 16-17). Finally, the appointment of an attorney ad litem also fails to bolster reliability of the termination order because there is no record that attorney performed pre-trial investigation, participated meaningfully at trial, or had any basis upon which to make a recommendation concerning J.C.'s best interest. Ms. Rhine is not impugning the ad litem; she simply points out the impossibility of evaluating the various safeguards in the absence of a trial record.

Finally, the Deatons correctly note that the Texas Family Code forbids assessment against the State of fees for court-appointed counsel in privately-initiated termination proceedings. TEX. FAM. CODE ANN. § 107.015(c) (Vernon 2002 and Supp. 2008). The trial court clearly felt constrained by that statute, specifically telling Ms. Rhine that even if she were appointed counsel, Tarrant County would refuse to pay the resulting fees (Transcript at 5-6). The Family Code requires that attorney ad litem fees must be assessed either to the parents or, if the parents are indigent, to any other party that can afford to pay. TEX. FAM. CODE ANN. § 107.015(a), (b) (Vernon 2002 and Supp. 2008). This statute essentially sets Texas termination proceedings at odds with this Court's decision in *Lassiter*.

In *Lassiter*, this Court held that due process necessitates the appointment of counsel in at least some termination proceedings, and it instructed trial courts to make a case-by-case determination of the need for appointment of counsel. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). But the Texas statute leaves trial courts in the untenable position of being unable to appoint counsel—even where due process demands it—in a case where none of the parties can afford to pay the resulting legal fees. The statute does not indicate what a Texas court should do where it performs the *Lassiter* analysis and concludes that due process requires court-appointed counsel, but finds that no party to the case can afford to pay for that court-appointed counsel. And this is another reason for granting review.

C. Ms. Rhine Cannot Prove Harm Because She Lacks The Trial Transcript.

Ms. Rhine cannot possibly demonstrate what effect counsel might have had at trial because she lacks the transcript. For that same reason, the Deatons cannot possibly demonstrate that the outcome would have been the same had counsel been appointed for Ms. Rhine. The Deatons' factual claims concerning Ms. Rhine assume that the trial testimony tracked pre-trial affidavits and instruments, which may or may not be true but is impossible to establish given the lack of a transcript.

The Deatons nevertheless attack Ms. Rhine as an unfit mother and a danger to J.C. based principally on allegations in an affidavit from Ms. Deaton (CR 8-11; Response at 18-19). That affidavit makes clear that many of the accusations are based on hearsay or other second-hand knowledge. More important, there is no record that Ms. Rhine ever

was permitted to confront these accusations. In fact, Ms. Rhine claims she was unable to confront the accusations meaningfully at the temporary orders hearing or trial due to her lack of counsel. As Ms. Rhine later noted: "Every question I asked [at the temporary orders hearing] was objected to by the other attorneys . . . ." (CR 40).

Texas adjudged Ms. Rhine indigent but denied her a lawyer both at trial and on appeal, made that decision without engaging in the *Lassiter* analysis required by this Court, refused to permit Ms. Rhine a free trial transcript, and then refused appellate review both of the merits of termination and the colorable due process and equal protection claims. In the end, Ms. Rhine said it best in her letter to the trial court: "Right now at this moment in time I need only two things[: J.C.] and an attorney" (CR 40).

CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

IKE VANDEN EYKEL
KOONS, FULLER, VANDEN EYKEL & ROBERTSON
2311 Cedar Springs #300
Dallas, Texas 75201
(214) 871-2727

CHARLES "CHAD" BARUCH
Counsel of Record
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

ERWIN CHEMERINSKY
UNIV. OF CALIFORNIA, IRVINE SCHOOL OF LAW
401 East Peltason
Irvine, California 92697
(949) 824-7722

Counsel for Petitioner Tracy Rhine

Supreme Court, U.S.
FILED
DEC 21 2009
OFFICE OF THE CLERK

No. 08-1596

In The Supreme Court of the United States

TRACY RHINE, PETITIONER

v.

CARL DEATON, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS SECOND DISTRICT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC059)
Austin, Texas 78711-2548
(512) 936-1700

QUESTIONS PRESENTED

1. Whether petitioner may invoke 28 U.S.C. 1257(a) to present two claims under the federal Constitution, neither of which was squarely pressed or passed upon in state court.

2. Whether petitioner's rights under the Due Process Clause of the Fourteenth Amendment were violated, in a parental termination suit, by the combined effect of (i) the trial court denying her request for appointed counsel under *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), (ii) the trial court denying her request for a free transcript on appeal under *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), and (iii) the appellate court failing to correct the first two errors *sua sponte*—notwithstanding that petitioner raised neither claim on appeal and the facts underlying her claims are disputed.

3. Whether the Texas statutory framework for appointing counsel to represent indigent parents in termination suits, which provides counsel in all government-initiated suits and on a case-by-case basis in private suits, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Statement 1

Discussion 5

A. Review is inappropriate because petitioner's federal claims were not pressed or passed upon below 6

B. Petitioner's due process claim does not warrant review because it raises a splitless, fact-bound question that carries no importance beyond this case 16

C. Petitioner's equal protection claim does not implicate any meaningful split and otherwise lacks merit 20

Conclusion 25

TABLE OF AUTHORITIES

Page

Cases:

Adams v. *Robertson*, 520 U.S. 83 (1997) (per curiam) ..... *passim*

In re Adoption of K.L.P., 763 N.E.2d 741 (Ill. 2002) 21

Bankers Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71 (1988) 8, 12

Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 7, 12, 13

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 15

Cohen v. *Cowles Media Co.*,
501 U.S. 663 (1991)..... 10

Eddings v. *Oklahoma*, 455 U.S. 104 (1982)..... 9

Gen. Servs. Comm'n v. *Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001) 15

Gideon v. *Wainwright*, 372 U.S. 335 (1963)... 14

Herb v. *Pitcairn*, 324 U.S. 117 (1945) 15

Howell v. *Mississippi*, 543 U.S. 440 (2005) (per curiam) 7, 8, 13, 16

Illinois v. *Gates*,
462 U.S. 213 (1983)..... 7, 8, 10, 12

Lassiter v. *Dep't of Soc. Servs.*,
452 U.S. 18 (1981) ..... *passim*

Mathews v. *Eldridge*,
424 U.S. 319 (1976)..... 16, 19

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940)... 7, 11

Mich.-Wis. Pipe Line Co. v. *Calvert*,
347 U.S. 157 (1954)..... 10

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996)..... *passim*

Murdock v. *City of Memphis*,
87 U.S. (20 Wall.) 590 (1875) 15

New York ex rel. Bryant v. *Zimmerman*,
278 U.S. 63 (1928) 8, 9

Plyler v. *Doe*, 457 U.S. 202 (1982) 23

Sanchez-Llamas v. *Oregon*,
548 U.S. 331 (2006)..... 16

Sochor v. *Florida*, 504 U.S. 527 (1992) 15

United States v. *Salerno*,
481 U.S. 739 (1987) 22

Vacco v. *Quill*, 521 U.S. 793 (1997) 22

Webb v. *Webb*, 451 U.S. 493 (1981) 9, 12

Wood v. *Georgia*, 450 U.S. 261 (1981) 13

Yee v. *City of Escondido*,
503 U.S. 519 (1992) 7, 10

Constitution, statutes, and rules:

U.S. Const. amend XIV, § 1 ..... *passim*

18 U.S.C. 3006A(a)(2) 24

28 U.S.C. 1257(a) (2006) ..... I, 5, 6, 7

28 U.S.C. 1257(1)-(2) (1982) 7

Judiciary Act of 1789, 1 Stat. 85-86 7

Sup. Ct. R. 10 17

Sup. Ct. R. 14.1(g)(i) 7, 9

Tex. Civ. Prac. & Rem. Code Ann. 13.003 2

Tex. Fam. Code Ann.:

101.032(a) 1

102.003(a)(5) 1

102.003(a)(12) 1

107.013(a)(1) ..... *passim*

107.015 2

107.021 ..... *passim*

109.003(a) 2

263.401(a) 2

Tex. R. App. P. 20.1 ..... 2, 4, 17

Miscellaneous:

Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* (6th ed. 2009) 8, 13

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 7

Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128 (1986) 7

Supreme Court of Texas Internal Operating Procedures (Apr. 17, 2009) 4

16B Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) 7

In The
Supreme Court of the United States

No. 08-1596

TRACY RHINE, PETITIONER

v.

CARL DEATON, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS SECOND DISTRICT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General of Texas to express the views of the State of Texas. In the State's view, the petition for a writ of certiorari should be denied.

STATEMENT

1. Chapter 161 of the Texas Family Code authorizes the termination of a parent-child relationship through civil actions. See Tex. Fam. Code Ann. 101.032(a). Such suits may be initiated by private parties, including foster parents, or by the government itself, often acting through the Child Protective Services Division of the Texas Department of Family and Protective Services. See Tex. Fam. Code Ann. 102.003(a)(5), 102.003(a)(12). The Code imposes different procedural rules for private and government-initiated actions. There is, for example, a one-year deadline for commencing trial in

government-initiated suits, but not in private suits. Tex. Fam. Code Ann. 263.401(a).

Texas grants indigent parents various procedural benefits in termination suits, including (where appropriate) court-appointed counsel. Indigent parents are automatically entitled to counsel, at public expense, in government-initiated suits. Tex. Fam. Code Ann. 107.013(a)(1), 107.015(c). Although the same right is not automatic in private suits, counsel may be appointed in the court's discretion. Tex. Fam. Code Ann. 107.021, 107.015.

Texas law also provides indigent parents a free copy of the trial transcript, at public expense, once indigence is established. Tex. Fam. Code Ann. 109.003(a); see also Tex. Civ. Prac. & Rem. Code Ann. 13.003. Courts may also authorize only partial payment of the transcript fee and postpone the deadline for full payment. See Tex. R. App. P. 20.1(k), (l).

2. Petitioner gave birth in Dallas County to a child, J.C., who tested positive for PCP upon delivery. Pet. App. 4a. Child Protective Services immediately placed J.C. in foster care with respondents, who reside in Tarrant County. *Ibid.* Child Protective Services thereafter initiated a termination suit against petitioner in Dallas County; respondents' motion to intervene was denied. *Ibid.*

Child Protective Services subsequently nonsuited the Dallas County action, and on the same day, respondents initiated this private termination suit in Tarrant County. Pet. App. 4a-5a. Although described as "a coordinated maneuver" between Child Protective Services and respondents, the

government dismissed its action "[b]ecause the statutory deadline for disposition of the termination suit was approaching and for other reasons not relevant to this appeal," *ibid.* (footnote omitted).

Acting *pro se* in respondents' suit, petitioner claimed indigence and requested counsel. Pet. App. 5a. In support of this request, petitioner did not assert a right to appointed counsel under federal law. See Pet. 3-4. The trial court denied her request: as the birth mother in a private termination suit, petitioner was not automatically entitled to appointed counsel under Section 107.013(a)(1), and the court declined a discretionary appointment under Section 107.021. Pet. App. 5a.

Following a bench trial, the court found termination in the child's interest, ordered petitioner's rights terminated, and appointed respondents as managing conservators. Pet. App. 12a-13a.

3. Petitioner appealed to the Court of Appeals for the Second District of Texas and requested appellate counsel. In response to this request, the court of appeals abated the appeal to the trial court, which again declined to appoint counsel. Pet. App. 7a. Thereafter, proceeding *pro se*, petitioner raised four state-law issues but no federal claims, see *ibid.*; "[t]hough [petitioner] complained of her lack of counsel, she did not raise due process or equal protection arguments," Pet. 5.

As to three of petitioner's state-law issues—challenging sufficiency of the evidence, a credibility determination, and a bonding assessment—the court of appeals found review foreclosed without the trial

transcript. Pet. App. 7a-8a. As the court explained, petitioner below had claimed an inability to cover appellate costs, but respondents contested her indigence affidavit under Texas Rule of Appellate Procedure 20.1. Pet. App. 6a. The trial court determined petitioner was at least partially indigent, waiving most costs but ordering her to pay $405 for the transcript. *Id.* at 6a-7a. (The parties dispute the order's factual basis: petitioner contends (Pet. 6) the court ordered her to pay despite finding her indigent, while respondents assert (Br. in Opp. 5-6) petitioner was found able to afford the transcript.) Petitioner did not pay the fee and consequently forwent a transcript. Pet. App. 7a. Petitioner did not appeal the indigence determination. *Id.* at 6a-7a & n.3.

The court of appeals addressed petitioner's fourth state-law issue—her claim to appointed counsel—on the merits. Pet. App. 8a. The court noted that, as a private (not government) termination suit, petitioner was not automatically entitled to counsel under Section 107.013(a)(1). Pet. App. 8a. The court also found no abuse of discretion in refusing to appoint counsel under Section 107.021. Pet. App. 8a. The court accordingly affirmed the judgment terminating petitioner's parental rights. *Id.* at 9a.

4. Petitioner, proceeding *pro se*, sought discretionary review in the Supreme Court of Texas, but again failed to present any federal claims. Pet. 7. The court requested merits briefing before acting on her petition, as it does in 25% of petition-stage cases. See *Supreme Court of Texas Internal Operating Procedures* 13 (Apr. 17, 2009), available at http://www.supreme.courts.tx.us/pdf/SCIOPs.pdf.

In merits briefing, prepared by *pro bono* counsel, petitioner for the first time raised a pair of federal claims under the Fourteenth Amendment. Pet. 7. First, petitioner argued that the denial of counsel, a transcript, and appellate review, operated together to violate the Due Process Clause. Second, petitioner argued that Sections 107.021 and 107.013(a)(1) of the Texas Family Code violate the Equal Protection Clause, by automatically providing counsel in government termination suits but not in private termination suits. Without addressing the merits, the court denied the petition. Pet. App. 1a-2a.

DISCUSSION

Petitioner raises two federal claims that were not squarely pressed or passed upon in state court. Under the text of 28 U.S.C. 1257(a) and a long line of decisions, this fact is fatal to the Court's appellate jurisdiction. This rule protects the strong interests of federalism and comity, avoids problems associated with resolving constitutional questions on an undeveloped record, and allows state courts to construe local statutes so as to avoid constitutional conflicts in the first place. Because this rationale applies here with full force, and nothing otherwise justifies an exception to this settled practice, the petition should be denied.

In any event, petitioner's federal claims are insubstantial. Her due process claim is fact-bound and case-specific, and the constitutional standards she seeks to invoke—under *M.L.B.* and *Lassiter*—are already enforced by Texas courts and codified in Texas law. Review is not warranted to apply settled standards to petitioner's unique situation.

Petitioner's splitless equal protection claim mounts a facial challenge to a statutory framework with a plainly legitimate sweep: because appointed counsel is authorized, at the court's discretion, in private actions, petitioner is incorrect that the statutory scheme is invalid in all its applications. Nor, indeed, is it invalid in *any*: it is not irrational for Texas to appoint counsel automatically when a parent faces the vast resources of the State but to act case-by-case when the plaintiff is a private party. Petitioner is wrong that the Constitution forbids States from providing counsel a step above the constitutional floor without being ordered to provide counsel automatically in every case. Further review is not warranted.

A. Review Is Inappropriate Because Petitioner's Federal Claims Were Not Pressed Or Passed Upon Below

Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. 1257(a), but she is mistaken. Petitioner presents two questions of federal law. By her own admission, however, neither was pressed in state court, and only one was even debatably passed upon—for the limited purpose of noting it had been *waived*. This Court's longstanding rule, resting on jurisdictional limits and sound practice, has been to refuse to upset state-court judgments on federal grounds never raised or resolved below. Because petitioner has no basis for departing from this traditional rule or its controlling rationale, her petition should be denied.

1. Petitioner cannot meet Section 1257(a)'s threshold presentation requirement. Under that statute and its antecedents, Congress has long

restricted this Court's appellate jurisdiction over state-court judgments to cases where federal rights are "specially set up or claimed" or a statute is "drawn in question" on federal grounds. 28 U.S.C. 1257(a) (2006). The Court has accordingly "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)); see *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); Sup. Ct. R. 14.1(g)(i); Eugene Gressman et al., *Supreme Court Practice* 183 (9th ed. 2007); 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4022, at 322 (2d ed. 1996).[1]

Although a "long line of cases" have "clearly stat[ed] that the presentation requirement is jurisdictional" in nature, a "handful" of relatively recent exceptions have raised the question whether the requirement is truly jurisdictional. See *Howell*, 543 U.S. at 445; *Adams*, 520 U.S. at 90; *Yee* v. *City of*

---

[1] This jurisdictional limitation dates back to the Judiciary Act of 1789, 1 Stat. 85-86. See *Gates*, 462 U.S. at 217-218. The current text of Section 1257(a) does not specify where a federal claim must first be invoked, but earlier iterations textually reference the state court's disposition, confirming that such claims had to be raised in state court. See, *e.g.*, 28 U.S.C. 1257(1)-(2) (1982); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1163 (1986).

Escondido, 503 U.S. 519, 533 (1992) (noting "very rare exceptions"); *Gates*, 462 U.S. at 217-219; Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 497 (6th ed. 2009) [hereinafter *Hart & Wechsler*]. But however that question is ultimately resolved, this longstanding "rule"—and it is consistently characterized as a *rule*, *e.g.*, *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988)—still imposes a powerful "requirement" that "prevents" consideration of unpreserved claims, *Howell*, 543 U.S. at 443.

2. Petitioner has not demonstrated that she satisfies the presentation requirement.

a. Petitioner has not only failed to establish that her claims were timely presented, see, *e.g.*, *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) (federal claims must be "brought to the attention of the state court with fair precision and in due time"), but she has affirmatively conceded that her federal claims were not pressed below: "Though Ms. Rhine complained of her lack of counsel, she did not raise due process or equal protection arguments." Pet. 5.

That concession is correct. Under settled law, it is inadequate to request counsel or a free transcript in general or generic terms. Unless the issue is described in terms that specify the objection is *federal* in nature, it is deemed insufficient, as a matter of law, to put the state court on notice that it has been presented with a federal claim. See, *e.g.*, *Howell*, 543 U.S. at 444 & n.2 (requiring citation to federal law or case decided on federal grounds, or a label indicating that claim is "federal"); *Adams*, 520 U.S. at 89 n.2 (holding that "passing invocations of 'due process'" in state-court briefing "did not meet

our minimal requirement that it must be clear that a *federal* claim was presented"); *Zimmerman*, 278 U.S. at 67-68 (finding insufficient claim "that the state statute was 'unconstitutional' [but] contain[ing] no mention of any constitutional provision, state or federal"). To be sure, "citation to book and verse" is not required, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 n.9 (1982), but "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts," *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

Review of the state-court opinions and cert.-stage filings reveals that no federal claim was raised here. Petitioner's four issues on appeal were articulated in terms of state, not federal, law. Pet. App. 7a. Her only claim that even resembles her belated federal attack is the request for counsel—but that objection is more readily construed as a *statutory* claim under Texas law. This would explain, for example, why the state courts proceeded by asking whether a Texas statute granted her an entitlement to counsel. Pet. App. 7a-8a. Nothing, however, indicates her argument was rooted in federal law.[2]

In addition, petitioner did raise her federal arguments before the Supreme Court of Texas, see Pet. 7, but the presentation requirement is not

---

[2] The underlying record in state court is sealed. If the record shows that federal claims were pressed below, this Court's Rule 14.1(g)(i) required petitioner to "specif[y]" when and where the federal claims were raised, which she has not done. In any event, petitioner herself has confirmed the lack of any such evidence in the record. See Pet. 5.

satisfied when a party belatedly asserts an argument for the first time in a state court that declines *discretionary* review. See *Yee*, 503 U.S. at 533; *Adams*, 520 U.S. at 89 n.3. Once the state supreme court denied review, petitioner had to show how she preserved her federal claims in the last court that reached the merits. And for good reason: were this petition granted, the writ would run to the intermediate court of appeals, not the state supreme court. Pet. 1; see *Mich.-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954). The court of appeals cannot be faulted for missing arguments in a brief that postdates its judgment and was filed in a different court.

b. Because petitioner did not press her federal claims below, she can only raise them now if the lower courts passed upon them *sua sponte*. See, *e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991). First, it is undisputed that the courts did not address petitioner's equal protection challenge to the statutory scheme for appointing counsel. See Pet. App. 1a-15a. Nothing in any opinion suggests an attempt to address a perceived unconstitutional disparity between the treatment of parents in private and government termination suits.

Nor is there any indication that the state courts resolved any component of petitioner's due process challenge. The lower courts did not, for example, address her request for counsel in federal terms, much less *constitutional* terms. That the court in passing (Pet. App. 8a) cited *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), does not prove otherwise. See *Gates*, 462 U.S. at 218 n.1 (requiring the claim to be "squarely considered and resolved").

Indeed, the court may simply have invoked *Lassiter* for the proposition that appointed counsel is presumptively *unavailable* in termination cases, see 452 U.S. at 25-27.

Moreover, while the court of appeals did briefly address the transcript issue and *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), it did so only in a footnote—and even then only to explain that petitioner had *not* challenged the order denying her a free transcript. See Pet. App. 6a-7a & n.3. Nothing within the four corners of the state-court opinion establishes that the court resolved a federal constitutional challenge.

3. Petitioner offers no principled basis for departing from the Court's presentation requirement in this case.

a. This venerable rule rests on a number of important considerations implicated here. It protects, first and foremost, the strong interests of federalism and comity: "due regard for the appropriate relationship of this Court to state courts requires * * * this Court * * * [to] refus[e] to consider any grounds of attack not raised or decided in" the state court. *McGoldrick*, 309 U.S. at 434-435; see also *Adams*, 520 U.S. at 90 ("it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider") (internal quotation marks omitted). Such concerns are particularly strong in this case. Petitioner challenges the constitutionality of a statutory framework for appointing counsel in termination proceedings. Regardless of why petitioner failed to attack the Texas Family Code below, her omission has deprived Texas courts of the critical "first

opportunity to consider the applicability of state statutes in light of constitutional challenge" and to construe the statutes "in a way which saves their constitutionality." *Cardinale*, 394 U.S. at 439.

Second, the rule reflects important "practical considerations," *Bankers Life*, 486 U.S. at 79: "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale*, 394 U.S. at 439; see also *Adams*, 520 U.S. at 90-91. Here, for example, had petitioner pressed the transcript challenge earlier, the record might clearly reflect whether petitioner was found able to pay and simply chose not to (as respondents contend) or instead was ordered to pay notwithstanding her indigence (as petitioner contends). This fact-intensive inquiry, not developed below, could disprove that the *M.L.B.* issue is even presented on these facts.

In addition, petitioner's failure to press her federal claims in state court suggests that any decision here might ultimately prove academic: a lurking independent and adequate state ground invoked upon remand could undercut this Court's disposition. See, *e.g.*, *Gates*, 462 U.S. at 222; *Webb*, 451 U.S. at 498 n.4. The presentation requirement "avoids [such] unnecessary adjudication" of constitutional issues. *Adams*, 520 U.S. at 90-91.

The circumstances here "justify no exception" from this longstanding requirement. *Id.* at 90.[3]

b. Contrary to petitioner's contention, the Due Process Clause does not compel a different outcome. It is settled that unrepresented litigants are fully capable of preserving their constitutional rights during trial and on appeal. Indeed, as the Court in *Lassiter* noted, this presumption applies in *all* cases

---

[3] Nor is *Wood* v. *Georgia*, 450 U.S. 261 (1981), to the contrary. The *Wood* Court addressed a due process challenge that was not raised or resolved in state court. See 450 U.S. at 264-265 & n.5. But the challenge was based on a defect in the state proceedings that *affirmatively prevented* the parties from pressing the claim: the challenge was based on *their own attorney's* conflict of interest, and the Court acknowledged the attorney's reluctance to identify his own conflict as a constitutional error. See *id.* at 265 n.5. Here, by contrast, nothing "in the state process prevented" petitioner from "raising [her] issue[s] in the first instance." Cf. *Hart & Wechsler*, *supra*, at 500. Moreover, in *Wood*, unlike here, no state statute was drawn in question on federal grounds; the federalism concerns underlying the presentation requirement were therefore much weaker. See *Cardinale*, 394 U.S. at 439. In addition, because the *Wood* petitioners had preserved a different federal claim, see *Wood*, 450 U.S. at 275 (White, J., dissenting), the Court had jurisdiction over at least that claim, and a remand was possible under 28 U.S.C. 2106 to consider the new question, see *Wood*, 450 U.S. at 265 n.5. Here, by contrast, there is no jurisdictional hook because *no* federal claims were raised or resolved in state court. Finally, were the Court to hold that *Wood* authorizes review here, it would also be forced to address the unresolved question whether the presentation requirement imposes a *jurisdictional* bar—a question that, if answered in the negative, might require overturning more than a century of precedent, see *Howell*, 543 U.S. at 445, a consequence not squarely considered in *Wood*.

(including termination suits) where imprisonment is not at stake. *Lassiter*, 452 U.S. at 25-27; see also *M.L.B.*, 519 U.S. at 112-113. This understanding cannot be squared with petitioner's novel constitutional theory, which would eviscerate the claim-preservation rules applied in state and federal courts for centuries.

Nor is there any limiting principle that might distinguish this situation from others involving *pro se* litigants and constitutional claims. Petitioner contends (Pet. Reply 1-2) that right-to-counsel claims under *Lassiter* are different (and cannot be waived), but she is wrong. *Lassiter* did not recognize a narrow and particular right to counsel because parents are unable to raise basic constitutional claims; the limited entitlement instead arose due to the need for counsel in the *underlying termination proceedings*. This is why *Lassiter* asks whether the proceedings are unusually complex, involve expert witnesses, or might lead to criminal sanctions. See *Lassiter*, 452 U.S. at 27-32. Every parent who is *not* protected by *Lassiter* must still raise every other constitutional objection that, according to petitioner, should be excused for *pro se* parties. So whereas the lack of counsel may excuse the failure to raise a sophisticated objection in a complex termination suit, it would not excuse the failure to assert the same constitutional challenges that all other indigent parties, who are not represented by counsel, successfully assert every day.

Nor does the extra latitude afforded *pro se* litigants eliminate the need to put state courts on notice of federal claims—even Gideon did that much. See *Gideon* v. *Wainwright*, 372 U.S. 335, 337 (1963)

(quoting *pro se* defendant's self-preserved claim). Petitioner's theory does not account for the serious interests, rooted in our constitutional structure, that would be undermined by a rule excusing *pro se* litigants from pressing federal claims in state court.

4. Independent of the presentation requirement, petitioner's *M.L.B.* claim is jurisdictionally defective for another reason: Even if the transcript issue were deemed passed upon (given the state court's limited declaration, in a single footnote, that the issue was not raised), an independent and adequate state ground would bar her claim. See *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875). In Texas, as elsewhere, a party waives any issue not argued in her appellate brief. *Gen. Servs. Comm'n* v. *Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 n.1 (Tex. 2001). Petitioner's failure to preserve the *M.L.B.* issue by raising it on appeal, as required by firmly established state procedural rules, constitutes an independent and adequate state ground precluding this Court's review. See, *e.g.*, *Sochor* v. *Florida*, 504 U.S. 527, 533-534 (1992).

Contrary to petitioner's contention (Pet. 14-18; Pet. Reply 1-4), invoking Texas's traditional error-preservation requirement with *pro se* litigants, even in termination actions, is consistent with due process. The federal Constitution does not require state appellate courts to "sit as self-directed boards of legal inquiry and research," giving *sua sponte* consideration to every potential trial error. *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). This view, if upheld, would fundamentally change the role of appellate courts in our adversarial

system: procedural default rules reflect the chief reliance "on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 356 (2006). Petitioner offers no precedent supporting a novel constitutional regime sweeping aside waiver rules for *pro se* litigants.

5. Because the presentation requirement, as a matter of power or prudence, warrants denial, this case presents a poor vehicle for resolving the question left open in *Howell* and *Adams*. But even if a prudential exception could save this petition, it is still a poor vehicle for another reason: there is no point in resolving the true nature of the presentation requirement only to reach fact-bound questions that do not independently call for review.

B. Petitioner's Due Process Claim Does Not Warrant Review Because It Raises A Splitless, Fact-Bound Question That Carries No Importance Beyond This Case

Petitioner contends that her federal due process rights were violated as a result of a combination of perceived errors: contrary to *M.L.B.*, she did not receive a free transcript for appeal; contrary to *Lassiter*, she was denied appointed counsel for the termination proceeding; and contrary to *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the state appellate court did not decide issues barred under ordinary error-preservation rules. Pet. 10-19. This case-specific argument does not warrant review.

1. Contrary to petitioner's contention (Pet. 6-7, 13, 14), Texas law does not flout *M.L.B.*'s holding

that an indigent parent is entitled to a free transcript when appealing a termination decree. See 519 U.S. at 107. After respondents contested petitioner's indigence, the trial court held a hearing to determine what appellate costs petitioner could afford. See Tex. R. App. P. 20.1(e), 20.1(k). The trial court sustained respondents' contest in part and ordered petitioner to pay for the transcript, while excusing other appellate costs. See Pet. App. 6a-7a. Because petitioner did not pay, she was not provided a transcript for her appeal.

This issue does not warrant review. There is no conflict between this Court's precedents and Texas law. As illustrated above, Texas provides a mechanism for obtaining a free transcript on appeal. And Texas courts—including the very court under review—apply *M.L.B.* and understand its holding. Pet. App. 6a n.3. If petitioner were entitled to a free transcript, the trial court's factual determination was incorrect. But that ruling was upheld not under the wrong constitutional standard, but because petitioner failed to invoke her rights (under federal *and state* law) in the first place.

In any event, petitioner's *M.L.B.* claim is predicated on a sharp factual dispute. The record does not clearly show why petitioner was forced to pay for the transcript. See Pet. App. 6a-7a & n.3; cf. *M.L.B.*, 519 U.S. at 109 (noting parent's *uncontested* indigence). On respondents' view, petitioner was denied a free transcript because she could afford the fee; on petitioner's view, the trial court ordered payment despite her indigence to benefit the court reporter. Pet. 6. That is a fact-bound question, not an important legal issue. Sup. Ct. R. 10.

There is no split or conflict with this Court's precedents; indeed, *M.L.B.* itself favorably cited an earlier iteration of Texas law as a statute *adhering* to the constitutional standard. See 519 U.S. at 122 n.13. The petition's fact-bound question does not require the Court's attention.

2. Petitioner contends (Pet. 13-19) that, under *Lassiter*, she was entitled to appointed counsel. Yet Texas law fully implements the *Lassiter* standard. Just as *Lassiter* commands (see 452 U.S. at 31), Texas courts are permitted to exercise discretion, on a case-by-case basis, to appoint counsel in private termination suits. See Tex. Fam. Code Ann. 107.021. This discretion is necessarily bounded by the Constitution, and hence it amounts to an abuse of discretion (under federal *and state* law) to refuse counsel in cases where *Lassiter* requires it. It is therefore clear that the Texas statutory framework is facially valid.

The only issue presented here, accordingly, is a fact-bound question whether, as applied to these particular circumstances, a single judge erred in a discretionary determination that counsel was not required—a determination petitioner has not shown was even presumptively incorrect. She has not, for example, cited the anticipated or actual use of expert testimony; highlighted the overwhelming complexity of the case or the sophistication of the legal issues; pointed to any danger of criminal liability; or demonstrated that any other *Lassiter* factors tip the balance in her favor. See *Lassiter*, 452 U.S. at 32-33.

This failure suggests petitioner lacks the factual support necessary for rebutting the presumption *against* the right to counsel. *M.L.B.*, 519 U.S. at 117.

But even with record support, this kind of narrow and case-specific issue does not rise to the level of importance warranting review. Cf. *Lassiter*, 452 U.S. at 32 (the due process inquiry is "answered in the first instance by the trial court," subject to appellate review).

Finally, petitioner appears to question whether state courts conducted a *Lassiter* analysis at all. Petitioner has not clearly shown, however, that the trial court ignored the *Lassiter* factors (or their equivalents) in declining to exercise its discretion, under Section 107.021, to appoint counsel. And, in any event, petitioner did not raise a *Lassiter*-based challenge in state court; had she done so, there is no reason to believe the lower courts (which were clearly aware of *Lassiter*, see Pet. App. 6a (citing it)) would not have conducted their analysis accordingly—had they not already performed the same case-by-case inquiry under Texas law.

3. Contrary to petitioner's contention (Pet. 16-18), the Constitution does not forbid state procedural rules that require parties to raise arguments or waive them. See *supra*, pp. 15-16. This alone suggests that petitioner's theory, under *Mathews* v. *Eldridge*, is unsound.

But petitioner's theory also fails here for a more fundamental reason. This was not an instance of Texas courts turning aside a *presented* issue because it was not preserved at trial. On the contrary, the court of appeals identified this issue *sua sponte*. To prevail here, petitioner therefore must expand her constitutional theory: she must not only show that States are obligated to abandon traditional error-presentation requirements, but also that due process

requires state courts to raise and resolve any federal issue found lurking in the record.

Nothing in the tradition or history of the Constitution requires such an extraordinary result. As with every State in the Union, Texas has an adversarial judicial system that depends on parties to press the contentions they wish courts to resolve. It is not the court's obligation to scour the record and uncover claims that a party could have raised. Petitioner cites no authority suggesting otherwise. In the absence of any conflict, this novel constitutional theory—threatening breathtaking changes in appellate courts nationwide—is particularly unworthy of review.

4. We do not doubt the fundamental importance of this matter to petitioner. The State itself has a strong interest in preserving parental rights, and the Texas statutory framework is designed to safeguard those rights while protecting the interests of children and third parties. But an isolated error in applying an otherwise valid scheme, though not insignificant, does not affect any substantial interests at a systemic level. The case-specific issues raised in the petition do not warrant further review.

C. Petitioner's Equal Protection Claim Does Not Implicate Any Meaningful Split And Otherwise Lacks Merit

Petitioner contends that Sections 107.021 and 107.013(a)(1) of the Texas Family Code violate the Equal Protection Clause by automatically appointing counsel to indigent parents in government-initiated termination suits but not in private suits. Pet. 19-

24. Even had this claim been raised or resolved below, the petition should still be denied.

1. There is no meaningful conflict requiring the Court's attention. Petitioner contends that the decision below conflicts with the decisions of four state courts (Pet. 20), but that is incorrect. As petitioner acknowledges, those decisions were based on violations of *state* law, not federal law. See Pet. 20 ("four * * * state supreme courts have concluded that [the appointment scheme] violates their respective state equal protection guarantees"). Although one court did equate the federal and state analyses, see *In re Adoption of K.L.P.*, 763 N.E.2d 741, 752 (Ill. 2002), that kind of shallow conflict does not present a compelling case for immediate review.

And petitioner's conflict is not just shallow, but nonexistent. Because the federal question was not pressed below, it was not passed upon by any Texas court. So on this particular question, Texas courts have *held* nothing. Were petitioner's constitutional analysis correct, it might prevail when actually presented to a state court. But it is premature to grant review on an assumption of what Texas courts *might* someday hold—assuming the constitutional question is not avoided on state-law grounds.

2. The petition also warrants denial because the claim is insubstantial on the merits: Sections 107.021 and 107.013(a)(1) of the Texas Family Code do not violate the Equal Protection Clause.

As a preliminary matter, petitioner has raised a facial challenge to "[t]he Texas statutory framework" on the ground that it "denies court-appointed counsel to some indigent parents while granting it to others."

Pet. 24. Such a constitutional attack is "the most difficult challenge to mount successfully." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). A statute is not facially unconstitutional merely because it "might operate unconstitutionally under some conceivable set of circumstances"—it must instead fail across the board. *Ibid.*

Petitioner cannot meet this heavy burden. Contrary to petitioner's contention (Pet. 20), it is not true that counsel is "arbitrarily with[eld]" from all indigent parents in private termination suits. Texas law grants courts discretion to appoint attorneys for indigent parents in private actions, see Tex. Fam. Code Ann. 107.021, and courts must exercise that discretion, at a minimum, to appoint counsel whenever due process requires it, see *Lassiter*, 452 U.S. at 31-32. Counsel is accordingly *not* "withheld" from an entire class of indigent parents under the statutory scheme. Because the Code has a plainly legitimate sweep—as at least some indigent parents in each category will receive the same appointed counsel—petitioner cannot "establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

3. Petitioner's equal protection argument even fails when re-cast as an as-applied challenge. The hallmark of equal protection is that like cases must be treated alike. See, *e.g.*, *Vacco* v. *Quill*, 521 U.S. 793, 799 (1997). But the two classes petitioner has identified are *not* alike. There is nothing arbitrary, as petitioner incorrectly suggests (Pet. 19-20), about separating defendants who face the government from defendants who face private parties. In government-initiated termination suits, the State's vast resources

are marshaled against the parent. See *Lassiter*, 452 U.S. at 28. The government attorneys are often experienced in the field and repeat players in the courts. And government-initiated prosecutions are more likely to yield criminal proceedings, magnifying the risks for indigent parents. Cf. *id.* at 27 n.3. The line Texas has drawn is supported by an important element of fairness: nowhere does the Constitution forbid the State's efforts to even the playing field when prosecuting a termination action against an indigent parent.

It is certainly true that the statutory right in government-initiated cases exceeds the bare constitutional minimum, see *Lassiter*, 452 U.S. at 33-34, and that this governmental benefit does not extend automatically to all indigent parents in private actions. But exact parity is not required when appointing counsel. See *M.L.B.*, 519 U.S. at 112-113 (finding the right "less encompassing"). There is nothing improper about a State instituting a categorical rule, as a prophylactic matter, designed to capture those cases that most often will require appointed counsel. Petitioner may disagree with the State's assessment, but it was rational for the State to conclude that private-suit defendants are not the same as government-suit defendants. See *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States.").

Nor is petitioner correct (Pet. 20-21) that strict scrutiny or other searching review governs her claim. See *M.L.B.*, 519 U.S. at 112-113 (noting the more lenient standard); *Lassiter*, 452 U.S. at 31-32 (holding that appointed counsel routinely is not

required in termination cases, notwithstanding the importance of parent-child relationships). The line in Texas law is not drawn based on suspect classes or fundamental rights. On the contrary, the statutory scheme turns on the identity of the *party bringing suit*. Parents sued by private parties are not a suspect class. This is much different from a statute, for example, that would appoint counsel only for members of one political party or one race. The line at issue here is neutral. Even if a level of scrutiny more stringent than rationality-review applies, the statutory distinction is sound.

At bottom, the statutory framework draws a sensible line, based on the considered judgment of the political branches, between classes of parties who are not similarly situated. Contrary to petitioner's contention, there is no constitutional command that States must appoint counsel in *every* case if they choose to appoint counsel anywhere above the constitutional floor. Cf. 18 U.S.C. 3006A(a)(2) (authorizing appointed counsel upon a determination that "the interests of justice so require"). Because petitioner's theory has not led to a mature split and is otherwise without merit, review should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

December 2009

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC059)
Austin, Texas 78711-2548
(512) 936-1700

(3)

Supreme Court, U.S.
FILED
JUL 29 2009
OFFICE OF THE CLERK

No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,
Petitioner,

v.

CARL DEATON, ET UX.,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals of Texas
Second District

BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONER

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073 [phone]
(512) 474-0726 [fax]
ATTORNEY FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE TRIAL AND APPELLATE COURT PROCEEDINGS WERE FUNDAMENTALLY UNFAIR TO MS. RHINE 3

II. LOW-INCOME TEXANS HAVE LITTLE ACCESS TO COUNSEL, AND HAVE A SUBSTANTIAL NEED FOR APPOINTED COUNSEL IN PARENTAL RIGHTS TERMINATION CASES 5

III. THE TEXAS CHILD WELFARE SYSTEM'S UNFORTUNATE HISTORY MAKES ERRONEOUS DEPRIVATIONS MORE LIKELY 9

IV. CONCLUSION: *LASSITER* MUST BE RECONSIDERED AND COUNSEL MUST BE APPOINTED IN ALL PARENTAL RIGHTS TERMINATION CASES 14

TABLE OF AUTHORITIES

Cases

In re K.A.W., 133 S.W.3d 1 (Mo. 2004) 14

In re Texas Department of Family and Protective Services, 255 S.W.3d 613, 615 (Tex. 2008) 13

Lassiter v. Department of Social Services of Durham County, 452 U.S. 18 (1983) passim
M.E. v. Shelby Co. Dep't of Human Res., 972 So. 2d 89, 102 (Ala. App. 2007) 14
M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) 1, 2, 4, 10
Mathews v. Eldridge, 424 U.S. 319 (1976) 4, 5, 10, 14
Stann v. Levine, 636 S.E.2d 214 (N.C. App. 2006) 14
Tammila G. v. Nevada, 148 P.3d 759 (2006) 14

Statutes

45 C.F.R. Sec. 1611 (2006), Appendix A 6
Tex. Family Code § 107.021 3, 4
Tex. Family Code §§ 107.013 4

Other Authorities

Carol Guensburg, Sorting through the Texas Polygamist Custody Case, NPR, May 8, 2008 12
Center for Public Policy Priorities: An Analysis of DFPS's LAR and Senate Bill 758, (March 5, 2007) 11
Dave Mann, Child's Play: Foster Care's Fiasco, Texas Observer, March 9, 2007 11
Hilary Hylton, The Future of the Polygamist Kids, Time Magazine, April 13, 2008 13
Joan Zorza, Domestic Violence Seldom Considered in Psychologists' Custody Recommendations, 2 Domestic Violence Report, 65 and 68 (1997) 7
Kelly Kelleher, et al., Co-Occurring Intimate Partner Violence and Child Maltreatment: Local Policies/Practices and Relationships to Child Placement, Family Services and Residence, (2006)7
Kirk Johnson & Dan Frosch, Sect Children Face Another World, but Still No TV, N.Y. Times, April 26, 2008 12
Legal Services Corporation, Documenting the Justice Gap in America, at 17 (June 2007) 6

Nancy K.D. Lemon, *The Future of Children*, Vol. 9, No. 3, Domestic Violence and Children (Winter, 1999) 8

Susan Schecter, et al., Effective Intervention in Domestic Violence and Child Maltreatment Cases, (1999) 9

Tex. Dept. of Fam. & Protective Serv., Renewal Initiatives: The Disproportionate Representation of Ethnic or Racial Groups in the CPS System (Disproportionality) 14

Tex. Health & Hum. Serv. Comm'n, et al., Fourth Senate Bill 6 180-Day Progress Report, at 54, (September 1, 2007) 14

Tex. Health & Hum. Serv. Comm'n, et al., Third Senate Bill 6 180-Day Progress Report, (March 1, 2007) 11

Texas Access to Justice Foundation, Access to Justice Facts (2009) 6

Texas Appleseed, Texas Foster Care: Current Issues, Reform Efforts and Remaining Problems (September 2007) 11

Texas Council on Family Violence, Abuse in Texas (2002) 9

The Perryman Group, The Impact of Legal Aid Services on Economic Activity in Texas, (February 2009) 6

U.S. Census Bureau, Current Population Survey, 2008 Annual Social and Economic Supplement 6

BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONER

The Texas Civil Rights Project ("TCRP") is a non-profit public interest law organization that promotes civil rights and racial, economic, and social justice. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations. TCRP has five offices around the state — in Austin, the Rio Grande Valley, El Paso, Houston, and Odessa.

TCRP has always had a strong interest in ensuring individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action. Protecting the equal protection and due process rights of low-income people has always been a priority for TCRP. Likewise, TCRP has always fought for gender equality and the rights of women and children. TCRP has successfully litigated a number of Title IX cases against school districts providing unequal opportunities to female athletes.

TCRP's Violence Against Women Act (VAWA) program helps immigrant survivors of domestic violence and their children obtain legal status in the United States to escape their abusers. Finally, TCRP was instrumental in having the State of Texas to adopt the interest on lawyers' trust account (IOLTA) program that funds legal aid providers around the state and ensures courts do not "bolt the door to equal justice." *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996). In short, TCRP works to solve "the age-

old problem of providing equal justice for poor and rich, weak and powerful alike." *Id.*

TCRP was founded in 1990, and has tax-exempt status under federal and state laws. It has participated as amicus curiae in other cases before this Court.[1]

SUMMARY OF THE ARGUMENT

Ms. Rhine was denied equal protection and due process in a proceeding terminating her right to involvement in the life of her child, J.C. — a right "far more precious than any property right." *M.L.B.*, 519 U.S. at 119. This proceeding was fundamentally unfair, as both the child and the alleged father were appointed counsel — Ms. Rhine was the only party without a lawyer. When the State and the Texas Department of Child Protective Services ("the Department") allows this fundamental unfairness to occur in a lawsuit involving such a fundamental right, it undermines confidence in the judicial process and discourages victims of domestic violence from seeking assistance from the State.

Finally, child protective services in Texas have a long history of chicanery similar to the "coordinated" effort here to dissolve Ms. Rhine's rights to participate in the life of her child. This shameful State conduct illustrates why this Court's decision in *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1983), must be

---

[1] Pursuant to Supreme Court Rule 37(6), amicus curiae states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

reconsidered, and counsel must be appointed to all parents in parental rights termination proceedings.

ARGUMENT

I. THE TRIAL AND APPELLATE COURT PROCEEDINGS WERE FUNDAMENTALLY UNFAIR TO MS. RHINE

Ms. Rhine was the only party who did not have the benefit of counsel in this litigation. Attorneys were appointed by statute to represent J.C. *and* J.C.'s alleged father, Anthony Farquason, even though Mr. Farguason "received process by substituted service but did not otherwise answer or appear." Petitioner's Appendix D, p.10a; Tex. Family Code § 107.021. J.C.'s attorney *ad litem* was paid $5,566.25, and Mr. Farquason's attorney was paid $1,200.00. Petitioner's Appendix D, at 14a. The costs of both these attorneys' fees were taxed against the foster parents the Department selected to raise J.C. *Id.*

The great irony of this case is had Ms. Rhine done nothing, as Mr. Farquason did, she likely would have been appointed an attorney to protect her rights. Instead, because Ms. Rhine proactively asserted her rights and attempted to represent herself, she was forced by her poverty to proceed without a lawyer. This result alone is fundamentally unfair.

The trial court's willingness to appoint attorneys for J.C. and Mr. Farquason cuts against any interest in not providing an attorney to Ms. Rhine. Decisions about the quantum of due process required are governed by a three-part test: (1) the

private interest affected; (2) the risk of an erroneous deprivation through the procedures used; and (3) the fiscal and administrative burdens the additional procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Texas statutes governing mandatory and discretionary appointments in parental rights termination cases do not require trial courts to consider these factors. *See* Tex. Family Code §§ 107.013, 107.021.

This Court has consistently recognized the State's ability to make a parent "forevermore a stranger to her children" is an awesome power, on par with its ability to incarcerate people. *See M.L.B.*, 519 U.S. at 560; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections"); *Lassiter*, 452 U.S. at 27 ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is ... a commanding one"). In addition to the parent's interest, the minor child "share[s] [this] vital interest in preventing erroneous termination of [the family's] natural relationship." *Id.* Both Ms. Rhine and J.C. had powerful interests in the termination proceeding.

Likewise, the risk of an erroneous deprivation is so high the trial court appointed an attorney to represent the alleged father, even though he never appeared and showed no interest in the proceedings. "[As] accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may be *unwholesomely unequal*." *Lassiter*,

452 U.S. at 28 (emphasis added). A party whose relationship with the child was never even finally established received greater protection than did the child's natural mother.

Finally, the fiscal and administrative burdens appointing Ms. Rhine an attorney would be minimal. The costs of the *ad litem* for J.C. and attorney for Mr. Farquason were paid by the petitioners—not the State. This is a fair allocation of costs. Similarly, appointing counsel for *pro se* litigants frequently eases administrative problems. Ensuring litigants are represented avoids the difficulties courts frequently encounter when dealing with *pro se* parties unfamiliar with judicial procedures.

As this case demonstrates, *Lassiter*'s requirement that trial courts conduct the *Mathews* analysis has proven untenable. (Indeed, Joseph Heller would enjoy requiring an unrepresented person to adequately present her argument that the due process analysis in *Mathews* requires appointment of counsel.) Of course, because Ms. Rhine was unrepresented, the trial court's *Mathews* analysis itself is effectively unreviewable as Ms. Rhine was unable to even secure a transcript for her appeal.

II. LOW-INCOME TEXANS HAVE LITTLE ACCESS TO COUNSEL, AND HAVE A SUBSTANTIAL NEED FOR APPOINTED COUNSEL IN PARENTAL RIGHTS TERMINATION CASES

Texas ranks 43rd in the nation in per capita revenue for the provision of legal aid.[2] In Texas, 813,000 families, 13.5 percent of the State's population, live in poverty.[3] To qualify for free civil legal services, an individual like Ms. Rhine cannot earn more than $13,538 per year.[4] Nationwide, there is only one legal aid lawyer for every 6,861 people living in poverty (compared with one attorney per 525 people in the general population).[5] These limited resources force legal aid providers to turn away between 75-80% of applicants each year.[6] Approximately half the cases handled by legal aid providers are family law cases, many of which involve domestic violence or child custody.[7] These realities mean many Texans effectively have no

---

[2] Texas Access to Justice Foundation, *Access to Justice Facts* (2009), *available at* http://www.teajf.org/news/statistics.aspx. The Access to Justice Foundation makes grants from the Texas IOLTA program, and is one of the funders of TCRP's work.

[3] U.S. Census Bureau, Current Population Survey, 2008 Annual Social and Economic Supplement, *available at* http://www.census.gov/hhes/www/macro/032008/pov/new46_100125_07.htm.

[4] 45 C.F.R. § 1611 (2006), Appendix A.

[5] Legal Services Corporation, Documenting the Justice Gap in America, at 17 (June 2007), *available at* http://www.lsc.gov/justicegap.pdf.

[6] *Id.* at 18. Limited resources prevent TCRP from representing closer to 90% of potential clients.

[7] The Perryman Group, The Impact of Legal Aid Services on Economic Activity in Texas, at 10 (February 2009), *available at* http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf.

access to *pro bono* counsel, even in proceedings as fundamental as the termination of parental rights.

Further, parents involved in child welfare proceedings are also more likely than members of the general public to be victims of domestic violence. A National Institute of Justice study found "domestic violence is a significant problem for 30% to 40% of families in the child welfare system."[8] The same study noted a "practical and inherent conflict [is] likely to arise when two systems – one dedicated to the protection of women exposed to violence, and the other to the protection of children experiencing neglect or abuse – experience the extensive overlap in family caseloads likely to occur with issues so commonly present together."[9] Despite this, domestic violence is rarely considered when child custody determinations are made.[10] There is a likelihood a woman like Ms. Rhine has suffered domestic violence in some form, in addition to being a mother fighting to retain a relationship with her child.

Both parents who are survivors and those who are not may also face criminal child neglect charges related to the basis for parental rights termination.

---

[8] Kelly Kelleher, et al., Co-Occurring Intimate Partner Violence and Child Maltreatment: Local Policies/Practices and Relationships to Child Placement, Family Services and Residence, at 5 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213503.pdf.

[9] *Id.* Of course, no record was developed or made available on appeal to show whether Ms. Rhine was a victim of domestic violence or not as she was not represented by an attorney at trial.

[10] *See* Joan Zorza, Domestic Violence Seldom Considered in Psychologists' Custody Recommendations, 2 Domestic Violence Report, 65 and 68 (1997).

This Court has previously observed "petitions to terminate parental rights are not uncommonly based on alleged criminal activity." *Lassiter*, 452 U.S. at 27 n.3. Survivors of domestic violence may face child abuse charges simply because of the abusive atmosphere their partner creates. "Battered mothers frequently have their parental rights terminated for failure to protect their children from exposure to domestic violence, even when neither the mother nor the batterer has psychically abused the children."[11]

Failing to provide community services to women in abusive relationships undermines the policy goal of keeping families together and getting help for abused children.

> To translate this vision into practice requires shifts in traditional practices. Historically, mothers often have been held responsible for a batterer's violence against them and their children. They may lose their children for failing to protect them from a domestic violence perpetrator. As [one mother] noted when she described the black-and-blue marks that her husband inflicted on her daughter, "*If I take her to the doctor, they'll take her away from me because I'm the mother and I allowed this.*" [Italics added.] Blaming a battered mother for being abused, for not leaving the domestic violence perpetrator, or for not stopping his violence is simply counterproductive. The battered

---

[11] Nancy K.D. Lemon, *The Future of Children*, Vol. 9, No. 3, Domestic Violence and Children (Winter, 1999) at 71.

> woman cannot change or stop the perpetrator's violence by herself. If she does not have adequate support, resources, and protection, leaving him may simply make it worse for her children. The battered woman and her children need the community's help.[12]

Given these realities, it is imperative courts be required to appoint counsel to parents facing the termination of their parental rights. Besides the importance of protecting this "commanding" interest, parents who are victims of domestic violence may refuse to cooperate with police and child welfare agencies, if they do not have confidence their rights will be protected and their family kept together. Currently, only 20% of Texans call the authorities when they or a family member experience domestic violence.[13] This Court recognized in *Lassiter* that appointing attorneys in parental rights termination proceedings is "wise public policy." *Id.* at 33. This Court must establish this as more than a "wise public policy," but also a constitutional entitlement.

III. THE TEXAS CHILD WELFARE SYSTEM'S UNFORTUNATE HISTORY MAKES ERRONEOUS DEPRIVATIONS MORE LIKELY

---

[12] Susan Schecter, et al., Effective Intervention in Domestic Violence and Child Maltreatment Cases, (1999) at 19.

[13] Texas Council on Family Violence, Abuse in Texas (2002), *available at* http://www.tcfv.org/resources/abuse-in-texas/.

In this case, the Department appears to have deliberately made an end-run around the Texas statute requiring appointment of counsel in Department-initiated termination proceedings. J.C. was born in Dallas County, where the Department took custody of her and initiated parental-rights termination proceedings against Ms. Rhine. Ms. Rhine was entitled by statute to counsel in this action. After the Dallas County court refused to allow the foster parents chosen by the Department to intervene, the Department dismissed the case and the Department-selected foster parents filed a separate termination proceeding in neighboring Tarrant County on the same day. The Fort Worth Court of Appeals, which reviewed the case, described this as a "coordinated maneuver." This disingenuous gamesmanship produced the Department's desired result — placing J.C. with the foster parents—by dancing around Ms. Rhine's statutory rights.

The Department is chronically underfunded and overburdened, resulting in many recent debacles. These embarrassments illustrate the absolute need for parents to be appointed counsel in termination proceedings as a check on arbitrary State action. The risk of erroneous decisions is multiplied when a parent is unable to "ensur[e] that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law." *M.L.B.*, 519 U.S. at 129 (Kennedy, J. concurring) (citing *Mathews*, 424 U.S. at 335).

Highly publicized abuses within the Department made headlines in 2004, around the same time as J.C.'s birth and initial involvement with the Department. An April 2004 report by the Texas Comptroller exposed a number of serious problems and deficiencies in the Texas foster care

system.[14] In 2005, the Texas Legislature's efforts at reform culminated in passage of legislation intending comprehensive change in the Department.[15] The primary Department deficiency targeted was large, unmanageable investigative caseloads.[16] These high caseloads and limited resources not only resulted in poor quality investigations, circumvention of procedures, and excessive investigative caseworker burnout and turnover rates, but also prevented the Department from focusing on outcomes and results rather then just crisis management.[17]

Despite attempts at reform, the Department still lacks adequate funding. Texas ranks 47th nationally in per-child funding for child welfare.[18] According to the Center for Public Policy Priorities, Texas spent an average of just $134 per neglected child, 58 percent less than the national average of $319 per child.[19] The disparities between states' child welfare agencies are striking, and another

---

[14] Texas Appleseed, Texas Foster Care: Current Issues, Reform Efforts and Remaining Problems (September 2007), *available at* http://www.texasappleseed.net/1HZ601!.pdf.

[15] Tex. Health & Hum. Serv. Comm'n, et al., Third Senate Bill 6 180-Day Progress Report, at 6 (March 1, 2007).

[16] Dave Mann, *Child's Play: Foster Care's Fiasco*, Texas Observer, March 9, 2007.

[17] Tex. Health & Hum. Serv. Comm'n, et al., First Senate Bill 6 180-Day Progress Report, at 17 (March 1, 2006).

[18] Center for Public Policy Priorities: An Analysis of DFPS's LAR and Senate Bill 758, at 1 (March 5, 2007) *available at* http://www.cppp.org/files/4/POP%20281%20-Nelson%20Bill.pdf.

[19] *Id.*

reason why a uniform right to counsel should be exist in parental termination court proceedings.[20]

The Department's haphazard handling of child protection issues drew national attention when the Department raided the Yearning for Zion Ranch, home of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS"). Despite attempts at reform, the FLDS fiasco shows the Department remains result-oriented and uninterested in respecting the fundamental rights of parents. On April 3, 2008, the Department took possession, without court order, of 462 children living at the ranch, and the filed suits seeking custody of the children — literally tearing away mothers from their children for months. The Department essentially argued the FLDS belief system abused all the children at the ranch because a very small number of actual child abuse incidents were alleged.[21] Experts and insiders concerned about the ability of the Texas child welfare system to handle properly the case said the system is "underfinanced and understaffed in the best of times, dysfunctional in the worst."[22]

---

[20] This Court has noted the costs of appointing counsel in termination proceedings would be relatively low in comparison with appointing counsel in criminal actions. *Lassiter*, 452 U.S. at 28.

[21] *See* Carol Guensburg, *Sorting through the Texas Polygamist Custody Case*, NPR, May 8, 2008. It was ultimately revealed the raid was sparked by a phone call from a disgruntled former member of the church who had made similar calls to authorities in Colorado and Arizona. The Colorado and Arizona authorities found the caller was not credible, and declined to pursue any investigation of the FLDS complexes in their states.

[22] Kirk Johnson & Dan Frosch, *Sect Children Face Another World, but Still No TV*, N.Y. Times, April 26, 2008.

The trial court complied with the Department's plan to remove these 462 children from their families. Dozens of attorneys from around the state appeared *pro bono* to assist the parents and children.[23] (In Texas, parents do not have a statutory right to appointed counsel in a suit that does not involve termination of parental rights.)

On May 29, 2008, the Supreme Court of Texas held the removal of the children was not warranted, and declined to disturb the court of appeals' decision granting writ of mandamus to thirty-eight mothers seeking return of their 126 children. *In re Texas Department of Family and Protective Services*, 255 S.W.3d 613, 615 (Tex. 2008).

But for the mothers' *pro bono* counsel challenging the district court's order separating them from their children, and naming the Department the temporary sole managing conservator of their children, the children's best interests and the mothers' fundamental rights, at best, would have languished in the court system. The FLDS mothers only had counsel because of the high-profile nature of the case. Thousands of women like Ms. Rhine whose cases do not make the front page have to fight for their children without an attorney every day.

Finally, indigent parents are more likely to have their children removed from their home, and African-American parents are more likely to have their children removed permanently. Texas' Health and Human Services Commission and the Department noted in a report in 2006 that poverty was a strong predictor of whether a child would be

---

[23] Hilary Hylton, *The Future of the Polygamist Kids*, Time Magazine, April 13, 2008. More than 350 lawyers offered their pro bono services to represent the children.

removed from the home, with more than 60 percent of child removals occurring in families with annual incomes of $10,000 or less.[24]

Further, Department data shows, relative to other racial or ethnic groups, a higher percentage of African American children are removed from their homes, a lower percentage are successfully reunited with their families, and a higher percentage age out of foster care without an adoptive family or other permanent placement.[25]

IV. CONCLUSION: *LASSITER* MUST BE RECONSIDERED AND COUNSEL MUST BE APPOINTED IN ALL PARENTAL RIGHTS TERMINATION CASES

Ms. Rhine's poverty and the Department's devious "coordinated maneuver" ensured she would not have an attorney when facing "the civil death penalty." *M.E. v. Shelby Co. Dep't of Human Res.*, 972 So.2d 89, 102 (Ala. App. 2007) (citing *Tammila G. v. Nevada*, 148 P.3d 759 (2006); *In re K.A.W.*, 133 S.W.3d 1 (Mo. 2004); *Stann v. Levine*, 636 S.E.2d 214 (N.C. App. 2006)). A person without an attorney cannot ensure the *Mathews v. Eldridge* analysis is properly applied to require an attorney be appointed

---

[24] Tex. Health & Hum. Serv. Comm'n, et al., Fourth Senate Bill 6 180-Day Progress Report, at 54, (September 1, 2007).

[25] Tex. Dept. of Fam. & Protective Serv., Renewal Initiatives: The Disproportionate Representation of Ethnic or Racial Groups in the CPS System (Disproportionality), *available at* http://www.dfps.state.tx.us/About/Renewal/CPS/disproportionality.asp.

when facing this "unique kind of deprivation." *Lassiter*, 452 U.S. at 27. In Texas, the Department's unfortunate history illustrates parents need appointed counsel to prevent the Department from orchestrating desired, erroneous outcomes. Thus, rather than leaving this critical analysis to the discretion of the trial courts, a bright-line rule requiring appointment of counsel is constitutionally required.

Respectfully submitted,

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073 [phone]
(512) 474-0726 [fax]

ATTORNEY FOR AMICUS CURIAE